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The Role of Regional Organizations in International Copyright Law

Thesis in partial fulfilment for the award of the Degree of Philosophy of Doctoral (PhD)

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Table of Contents

Thesis Abstract

This research will examine the role which regional organizations play for the implementation of the international copyright protection framework in their member states. This is done in order to gain an increased understanding of the impact that international and regional agreements have on national copyright legislation and its enforcement through national and regional courts. The issue of how copyright balance is reflected and implemented in these legal structures is of central importance to this research, since regional or national preferences can influence in which manner the creator's or the user's interests are represented in law. The theoretic concepts of constitutionalization (particularly in terms of institutionalization), embedded liberalism (as providing a theoretical link between social concerns and trade liberalization) as well as proportionality (in representation of the rights balancing done by courts) will be utilised in this research.

The interconnected legal relationship of copyright will be examined utilizing the case studies of the European Union and the UK as well as the example of the Andean Community and Ecuador. In order to have an increased understanding of the difference in terms of implementation between being part of a regional union and not being a member state of such, the situation in Chile will also be part of this research and the comparative analysis. Chile is a case study which, through comparison with the legal and institutional framework of regional organizations, illustrates the situation of a country which is not part of a regional organization and entered into independent bilateral treaty obligations instead.

These countries provide also a basis for considering the differences in preferences between developed and developing countries in the context of international and regional copyright protection. This can bridge the current gap in understanding of the particular effect that international and regional copyright legislation has on such countries. The conclusions and research findings of this research provide an insight into the importance that regional organizations have in shaping the legal framework of their members in accordance with a set of preferences in regards to copyright interests.

Chapter 1

Introduction

The importance of international legislation and cooperation is paramount for the increased stability of countries around the globe. Economic, social and political progress is tightly linked to legislative and institutional stability and the interconnectedness and harmonization of legal principles across nations is the corner stone. In addition, the understanding that national legal systems do not operate in isolation but neither does international law implement itself, is a vital consideration for this study. The main hypothesis that will be explored during this research is that; "Regional organizations, through their more specific harmonization of copyrights play a decisive role in providing a balanced legal framework for their member states, by taking into account their particular needs and preferences".

The need for a balance in copyright legislation goes hand in hand with a difficulty in finding the adequate level of copyright[1] protection in individual countries and internationally. On the one hand, copyright has to provide creators with legitimate rights to obtain remuneration and safeguard their interests. On the other hand, access to and utilization of copyright protected works is essential for society in order to further develop knowledge, art and culture. There is a need to reflect on the balance between the different interests which ought to be incorporated in the adaptation of copyright law[2], particularly since copyright law can significantly restrict access to knowledge. The economic importance that intellectual property has for the industrial competitiveness of nations can be seen as a vital point in relation to the promotion of economic and social

[1] A definition of what copyright entails can be found for instance in "Intellectual Property Rights", Lionel Bentley and Brad Sherman, 2009, Oxford University Press or for more internationally aimed considerations "Intellectual Property Rights in the Global Economy", Keith E. Maskus, 2000, Institute for International Economics

[2] "Copyright and free access to information: for a fair balance of interests in a globalised world", Christophe Geiger, 2006. European intellectual property review, 28(7)

developments. A criticism of the logic that strong property rights will lead to sufficient incentives for the provision of public activities, but can rather hinder national states in performing welfare functions, has been presented by Maskus and Reichman[3]. For this study, the preliminary assumption of a need for a copyright balance[4] and with it the recognition of the principle of "no rivalry" in the consumption of knowledge is essential, since this principle highlights the fact that many copyrighted works, such as books or CDs, can be accessed by one person without inhibiting another person from also accessing the material. There is no detriment in providing multiple and simultaneous access to the same works by different people in different parts of the globe[5].

On an international level, the treaty which centres on the harmonization of copyrights is the Agreement on Trade-Related Aspects of Intellectual Property Rights and this is one of the treaties implemented under WTO law. TRIPS provides a minimum standard which should be implemented and enforced in all of the member states, however they are free to make provisions for stronger protection[6]. This agreement also includes the means for dispute settlement and procedural matters. Yet,

[3] "The globalization of private knowledge goods and the privatization of global public goods", Keith E. Maskus and Jerome H. Reichman in "International Public Goods and Transfer of Technology Under a Globalized IP Regime", Keith E. Maskus and Jerome H. Reichman, 2005, Cambridge University Press

[4] For an idea of some other perspectives on this matter please see: – "From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test", Christophe Geiger, 2007, European Intellectual Property Review - "The danger of protecting too much: a comparative analysis of aspects of intellectual property in Hong Kong, Britain and the United States", Michael D. Pendleton, 2000, European Intellectual Property Review – "The lawful user and a balancing of interests in European copyright law", Tatiana-Eleni Synodinou, 2010, International Review of Intellectual Property and Competition Law – "Too much is never enough? The 2011 Copyright in Sound Recordings Extension Directive", Benjamin Farrand, 2012, European Intellectual Property Review, Legislative Comment and ""Balanced" copyright: not a magic solving word", Alan Story, 2012, European Intellectual Property Review

[5] The principle of non-rivalry in relation to intellectual property has been explained for instance by "Knowledge as a Global Public Good", Joseph E. Stiglitz, 1999, The World Bank and "Congestible Intellectual Property and Impure Public Goods",David W. Barnes, Summer 2011, Northwest Journal of Technology and Intellectual Property, Vol.9 Issue 8

[6] A critical perspective and summary of these characteristic can be found in: "Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement", Jerome H. Reichman, The International Lawyer, 1995, Vol.29 No. 2, pages 345-388

each country has some flexibility to adopt independent means in order to implement this agreement. TRIPS is wide-reaching in its effects since it applies to every country which is part of the WTO and harmonizes intellectual property rights for the first time across a wide range of countries. Due to the nature of its being applicable to such a variety of fundamentally different countries, TRIPS has both the potential to act as a support for development and the potential danger of imposing legislation which might not be adequate[7]. TRIPS does not operate in isolation and needs to be reconciled with other international agreements and conventions which complement it[8] as well as specific national and regional legislation. Therefore, it is very important to look at its later implementation into the national legal framework of a country.

A specific problem arises out of the differences between countries in their economic status, but also in relation to their approach towards protection. For example, Professor Carlos Correa has written extensively about the problems arising for developing countries through TRIPS in relation to competition policy, technological markets and enforcement, which at times require them to adopt different approaches to IP protection[9]. Under TRIPS, developing countries have some flexibility, such as an additional amount of time in order to implement TRIPS and certain provisions where agreed on to make things such as essential medicines available, mainly utilising compulsory licensing. Some of these aspects have been clarified and extended by later discussion rounds, such as the Doha Conference and the Marrakesh Agreement.

[7] "Globalising Intellectual Property Rights: The TRIPS Agreement", Duncan Matthews, 2002 Routledge

[8] For a summery perspective see for instance; "A long "TRIP" home: how the Berne Convention, TRIPS Agreement, and other instruments complement the international copyright system", Bashar H. Malkawi, 2013, European Intellectual Property Review

[9] "Intellectual Property and Competition Law; Some Issues of Relevance to Developing Countries", Carlos Correa, October 2007, www.ictsd.com While exploring these issues he remarks the direct effects that the acquisition and use of intellectual property rights have on the market entrance and competition as well as looking at the difference in the markets that need to be taken into account when considering the importance of IP legislation and competition regulating rules. For more information also see "Indicators of the Relative Importance of IPRS in Developing Countries", Sanjaya Lall, ICTSD, Project on IPRS and Sustainable Development, Issue 3, 2003

The international legislative framework is shaped by certain attitudes and ideas[10], but it is important to make sure that increasing participation and possibilities arise for developing countries to input their understanding into regulations binding them as well. The specific context of developing countries is also analysed in Carolyn Deere's[11] book from a more political than legal point of view and it takes into account the economic and political pressures exerted upon developing countries within the TRIPS framework, specifically within francophone African countries. There are also other areas of concern which exemplify the diverse interests that arise in relation to copyright protection specifically in relation to developing countries, are that of public health[12], traditional knowledge[13] and access to knowledge for further research and development[14].

The purpose behind TRIPS as harmonizing the international copyright framework poses a variety of issues not just in relation to developing countries but also in relation to the theory behind the need for international copyright law and the overarching legal system that supports it. Danoff and Trachtman express the difficulties and potential that the international legal framework holds in the book "Ruling the World"[15]. In

[10] See; "Reflecting on 'Linkage': Cognitive and Institutional Change in The International Trading System" Andrew T. F. Lang, July 2007

[11] "The Implementation Game - The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries", Carolyn Deere, 2010, Oxford University Press

[12] For example; ""Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the USA", Jerome H. Reichman and Catherine Hasenzahl, International Centre for Trade and Sustainable Development (ICTSD), 2003 and "The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines under the Amended TRIPS Provisions", Frederick M. Abbott* and Jerome H. Reichman, Journal of International Economic Law, 2007, Issue 10(4), pages 921–987

[13] See for example; "Intellectual Property, Biogenetic Resources & Traditional Knowledge", Graham Dutfield, 2004, Earthscan - "A Critical Analysis of the Debate on Traditional Knowledge Drug Discovery and Drug-based Biopiracy", Graham Dutfield, 2011, European Intellectual Property Review

[14] See for instance; "The innovation dilemma: intellectual property and the historical legacy of cumulative creativity", Graham Dutfield and Uma Suthersanen, 2004, Intellectual Property Quarterly

[15] "Ruling the World? - Constitutionalism, International Law, and Global Governance", Jeffrey L. Dunoff and Joel P. Trachtman, 2009, Cambridge University Press

addition to notions of balance, it is relevant for further research to have an understanding of the international constitution such as the legal structure[16]. There are some articles which explore the issue of harmonization itself, for example, in relation to some problems in the sense that uniformity in law might exclude some aspects of unpredictability but does not necessarily mean that it is always beneficial to all parties[17]. This is the point of view heavily supported by the above literature in relation to developing countries. However, others express perspectives of the historical development and arguments in favour of legal harmonisation[18], especially in relation to predictability and trade stability[19]. This research will seek to somewhat close the particular knowledge gap in relation to the question of the role that regional harmonisation plays for the national application of international law.

Apart from the legislative provisions that affect national law differently, there are also other issues that clearly contribute to differences in implementation and approaches towards copyright protection. The pressure tactics that are employed on an international level by some countries in order to manipulate others into accepting much more extensive protections than those established under TRIPS are one point of serious concern for the national effect that the international framework of copyright protection and related interests can have[20]. Although there have been other

[16] Some of the theoretical applications and implications of this book are important for understanding and comparative analysis of this thesis and are explained and examined in much greater detail in the chapter regarding the theoretical framework.

[17] "The Economic Implications of Uniformity in Law", Souichirou Kozuka, 2007, Uniform Law Review

[18] "Harmonisation of international patent law", Joseph Straus, Nina-Sophie Klunker, International Review of Intellectual Property and Competition Law, 2007 also see for comparison "The Limits of Substantive Patent Law Harmonization", Graham Dutfield, 2014 in "Patent Law in Global Perspective", Bagley and Okediji, Oxford University Press, "Harmonisation and Differentiation in IP protection? The lessons of history", Graham Dutfield and Uma Suthersanen, 2005, Prometheus, Vol.23

[19] "Unification and Harmonization of Law Relating to Global and Regional Trading", George A. Zaphiriou, 1994, Northern Illinois University Law Review

[20] ""To copy is to steal": TRIPS, (un)free trade agreements and the new intellectual property fundamentalism", Graham Dutfield, 2006, Journal of Information Law & Technology

international agreements such as the Paris and Berne Convention, TRIPS is the most recent and most comprehensive agreement on this subject matter and is therefore the international legal focus of this research. The notion of international copyright protection being for the benefit of few and to the detriment of many, in the sense that "copyright has developed as a way to reward the haves"[21], is fairly common and has prompted much discussion as to the relationship between TRIPS and developing countries[22]. It is essential to remember that international law is not static[23], but rather that it can develop and adjust in relation to the challenges it faces[24]. Therefore, it is essential to look at international law in the context of regional developments which can be influenced by it but may also provide a source of information that pushes further development ahead. In this context, it is also important to remember recent developments such as the Doha Declaration[25] and Marrakesh Treaty[26]. However, the way in which these possibilities are employed and therefore the benefit they will yield is also largely dependent on their utilization in the regional and national context[27].There are some exceptions available to developing countries in

[21] "Copyrights and Copywrongs", Siva Vaidhyanathan, 2001, New York University Press

[22] A book which gives an overview over recent issues, including public health, genetic resourcs and new technologies is: "TRIPS and Developing Countries -Towards a New IP World Order?", Gustavo Ghidini, Rudolph J.R. Peritz and Marco Ricolfi, 2014, Edward Elgar Publishing

[23] For some considerations see: "Rethinking innovation, development and intellectual property in the UN: WIPO and beyond", Sisule F Musungu, 2005, QIAP

[24] For a view in relation to the challenges and potentials of international copyright law see: "From hard to soft law - a requisite shift in the international copyright regime?", Maciej Barczewski, 2011, International Review of Intellectual Property and Competition Law

[25] Full text of the Doha Ministerial Declaration on the TRIPS agreement and public health can be found at; http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

[26] Full text of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled can be found at: http://www.wipo.int/treaties/en/ip/marrakesh/

[27] See for example considerations presented in "Trade, Doha, and Development - A Window into the Issues", Richard Newfarmer, 2006, The World Bank and herein particularly in relation to TRIPS by "Intellectual Property and Public Health: The WTO's August 2003 Decision in Perspective", Carsten Fink – "Trade Facilitation: Progress and Prospects for the Doha Negotiations", Gerard McLinden - "The Debate on Geographical Indications in the WTO", Carsten Fink and Keith Maskus

general, among others, these are for scientific and private use[28], however, the needs and interests that different countries face are diverse and might not be covered by these general circumstances. One point that is evident from previous research is that developing countries are often looked at in quite a general manner, however it is necessary to be aware that there are differences in needs and priorities from one developing country to the next[29]. For example, not all developing countries are the same, neither in their ability to participate in nor in their preferences for cross-border trade. Correa[30],for example, has written about the principal aspects which need to be taken into consideration as the differences between developing countries, such as the priority and extent of combatting other types of crime, as well as the long term sustainability of enforcement measures.

Apart from recognising this importance, a rather more critical perspective on the benefits of the TRIPS agreement, particularly in relation to developing countries, has been expressed by Dutfield and Suthersan[31]. This is evident by their stating that "general principles recognised in the majority of countries force the remaining nations to change their laws[32]". Further, in order to underline the problematic nature of a 'one-size-fits-all' approach, Joseph Stieglitz was quoted as saying that "Intellectual Property is important, but the appropriate intellectual property regime for a developing country is different from that for an advanced industrial country[33]". This reflects two contributory questions which this thesis seeks to shine some light upon: What actually happens when countries with

[28] "Exceptions to Patent Rights in Developing Countries", Christopher Garrison, 2006, International Centre for Trade and Sustainable Development (ICTSD)

[29] See also for instance: "How does patent protection help developing countries?", Ali M. Imam, 2006, International Review of Intellectual Property and Competition Law

[30] "The Push for Stronger Enforcement Rules: Implications for Developing Countries", Carlos Correa, 2008, International Centre for Trade and Sustainable Development (ICTSD)

[31] "Global Intellectual Property Law", Graham Dutfield and Uma Suthersanen, Edward Elgar Publishing, 2008

[32] Page 3 of "Global Intellectual Property Law"

[33] Page12 of "Global Intellectual Property Law"

different needs and preferences are bound by the same international law? To what extent can regional organizations help to promote a balance that takes these preferences into account?

Therefore, this thesis seeks to further amplify the understanding of how different approaches towards international and regional cooperation shape the copyright legislation in developing countries. For this purpose, Ecuador and Chile have been selected for this analysis, as they exemplify two developing countries with a distinctive approach in relation to their copyright protection preferences and their focus of international cooperation. Ecuador is focused on regional integration as part of the Andean Community and Chile is a major participant in bilateral trade agreements[34]. Some of the TRIPS-plus agreements which have been entered into by Chile and other developing countries contain, for example, more restrictive standards, limitations on the use of flexibilities and safeguards as well as the forwarding of deadlines[35]. The selected countries can be utilized to bridge the gap in understanding the interconnectedness of regional or bilateral treaties in relation to differences between developing countries. Further, the UK will be contrasted against them in order to provide an insight into the European Union's role in providing a regional copyright framework for developed countries, especially in relation to a country with a long history of copyright protection such as the UK.

Regional organizations have the ability to take the specific preferences and needs of their member states into consideration when they create overarching legislative structures[36]. Therefore they could have the potential to implement the international obligations of TRIPS in a manner

[34] An explanation of why intellectual property protection is included into bilateral treaties can be found in "Regional and bilateral agreements and the TRIPS-plus world: The Free Trade Area of the Americas", David Vivas-Eugui, www.ictsd.org/iprsonline

[35] An analysis of some of these provisions is contained in "Regionalism, Bilateralism, and "TRIP Plus" Agreements: The Threat to Developing Countries", Ruth Mayne, 2005,

[36] See for instance considerations of deliberative democracy as presented in: "Democracy, Solidarity and the European Crisis", Jürgen Habermas, 2013, Lecture delivered in Leuven - "Deliberative Democratic Theory", Simone Chambers, 2003, Annual Review for Political Science – "Communicative Power in Habermas's Theory of Democracy", Jeffrey Flynn, European Journal of Political Theory – "Deliberative Democracy and Public Reason", Kenneth Baynes, 2010, Veritas

which simultaneously takes into account specific interests while still creating a harmonized and predictable legal and institutional framework. In relation to regional organizations, much has been written about their institutions and legal structures, particularly in relation to the EU[37]. However, no study has been carried out which specifically seeks to identify their impact in relation to international and national copyright laws[38]. Even more so, the aim to identify principles or problems for regional organizations that unite developed countries in the EU in contrast to the cooperation of developing countries in the Andean Community is of central importance. The Commission on Intellectual Property Rights has worked on a study paper which looks at the implementation of the TRIPS Agreement by developing countries[39]. Essentially, it takes a look at the different legal provisions which have been implemented by developing countries around the world in response to TRIPS. However, no detailed analysis is made of any of the considered countries' implementation on a national level, the focus is mainly on the regional requirements instead. Some research has been conducted by lawyers in Ecuador[40] and Chile[41] in relation to their

[37] "Highlights of the origins of the European Union law on copyright", Julian Rodriguez Pardo, 2001, European Intellectual Property Review – "Geographical Indications and Agricultural Community Development: Is the European Model Appropriate for Developing Countries?" Graham Dutfield, 2014 in "The Intellectual Property and Food Project: From Rewarding Innovation & Creation to Feeding the World", Lawson and Sanderson, Ashgate - "Experiences from Europe: Legal Diversity and the Internal Market", Horatia Muir Watt, 2004, Texas Law Review "What developments for the European framework on enforcement of intellectual property rights? A comment on the evaluation report dated December 22, 2010", Christophe Geiger, Jacques Raynard and Caroline Roda, 2011, European Intellectual Property Review - "From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test", Christophe Geiger, 2007, European Intellectual Property Review – "Intellectual property and regional trade arrangements in Europe, Asia and the Western Hemispheres", Mike Willis and Michael Blakeney, 1998, International Trade Law & Regulation

[38] An example of a paper which looks at the EU's policy on foreign countries is " Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries", Maximiliano Santa Cruz, 2006, ICTSD

[39] Study on the Implementation of the TRIPS Agreement by Developing Countries, Phil Thorp, Commission on Intellectual Property Rights, Study Paper 7

[40] For example: "Importancia de la Difusion de la Propiedad Intelectual en el Ecuador Como Fuente de Desarrollo Economico", Leticia Jara Trivino and Clara Polo Novillo – "Las Licencias Obligatorias como Límites a los Derechos de Propiedad Intelectual", Ricardo Antequera Parilli and Ricardo Enrique Antequera,

national intellectual property protection and to some extent in relation to their regional or bilateral commitments. Yet, this has been done without comparison to other countries and with much disregard of the international sphere. Therefore, what is proposed with this research is a new examination of these countries' principal copyright legislation and the connected regional, bilateral and international laws. Only through such a sustained comparison and analysis can an adequate understanding of the implications of these interconnected legislative frameworks be found since, although regional and bilateral agreements are concluded independently, they are still subject to provisions made under international law, such as the "international minimum standard".

Research Methodology

What will be written is a thesis which aims to illustrate, within the limits of a PhD, that there is an issue with generalizing a country's approach towards copyright protection purely on the basis of their TRIPS membership or the fact that they are a developing country. Through isolated examination, only very specific or very general conclusions can be drawn. Here lies the value of employing a more comparative approach of testing the hypothesis that regional organizations influence the national implementation of TRIPS; it will be tested in two different economic and historic regions (in the EU and the Andean Community) and then this will be compared and contrasted against a situation of independent trade affiliation (by Chile). While there may be some issues in relation to the labels of international, regional and national law, as there are complex horizontal and vertical connections between these different levels of legal

2009, Revista Jurídica de Propiedad Intelectual – "El Nuevo Contexto del Derecho del Autor en el Siglo XXI", Carlos Fernández Ballesteros, 2009, Revista Jurídica de Propiedad Intelectual – "Las Medidas en Frontera en el Ecuador", Natasha Bluztein and Nelson Yépez Franco, 2011, Revista Jurídica de Propiedad Intelectual

[41] For example: "En Busca de Equilibrios Regulatorios: Chile y las Recientes Reformas al Derecho de Autor", Daniel Alvarez Valenzuela, 2011, ICTSD – "Reform to the Criminal Justice System in Chile: Evaluation and Challenges, Rafael Blanco, Richard Hutt and Hugo Rojas, 2006, Loyola University Chicago International Law Review – "Estrategia de Integracion de Chile:¿Existe Marge para Mejorar?", Mauricio Mesquita Moreira and Juan Blyde, 2007, Banco Interamericano de Desarrollo - "Estudio sobre la importancia de las industrias y actividades protegida por el derecho de autor y los derechos conexos en los países de MERCOSUR y Chile", WIPO

governance[42], nonetheless they are to be understood in the context of this research in a more transnational law context[43]. This terminology is not aimed at representing some sort of qualitative value but is rather descriptive in relation to the radius of legal operation it applies to.

Due to the complexity of the hypothesis, as questioning the role of regional organizations for the implementation of TRIPS, both exploratory and evaluative legal scholarship will have an influence on this research. The principal parts of the exploratory, more descriptive aspects of this research will be contained in chapters three to seven, which highlight the situation of current international, regional and national copyright laws, while these chapters also contain some evaluative assessment[44] of how the legal structures operate in connection with each other. The important application of a conceptual apparatus[45] in employing principles of constitutionalism, embedded liberalism and proportionality to the evaluation and analysis of the collected data will be explained in chapter two which is dedicated to the theoretical framework behind this research. Due to the limited time scope and extent of this research, some connected issues, such as legal pluralism[46], will only be touched upon briefly and only to the extent that they are strictly relevant.

The method for this complex research will essentially be based on a qualitative comparative analysis. Comparative analysis is often used to test whether a particular legal idea is true in different systems[47], which is directly applicable to the exploration and evaluation of the role of different but inter-connected legal structures.

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[42] "Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders", Neil Walker, 2008, International Journal of Constitutional Law pages 373-96

[43] "Transnational Law", P Jessup, New Haven, Yale University Press, 1956

[44] "Research Methodologies in EU and International Law", Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley with Alexandra Bohm, 2011, Hart Publishing, Page 9

[45] "Research Methodologies in EU and International Law", page 11

[46] Although this could be used as a way of interpreting the relationship between international and regional legal frameworks, this research looks at them more in a manner of co-related and interconnected frameworks.

[47] "Research Methodologies in EU and International Law", Page 28

A qualitative rather than a quantitative approach will be taken to the subject matter. The difference between quantitative and qualitative research can be explained as that the first form of research is concerned with the measuring of a feature that is present, while the second form of research seeks to identify what features are present or absent in a particular context[48]. Quantitative studies focus much more on empirical evidence, like for example the number of copyright cases brought before the WTO or the national courts. Although great benefit can be derived from the utilization of this form of research, it is not the most appropriate way of looking at the interconnected relationship that exists between the copyright frameworks on an international, regional as well as national level. The simultaneous consideration of these different tiers of co-related legal frameworks and the aim to assess the impact that they have upon each other requires a more interpretive approach towards the data, particularly when taking into account that much of the data that will be gathered is more indicative than positivist in nature.

The benefit of conducting qualitative research in the legal context implies to some extent that it is of a more subjective nature which, on the one hand, enables the interpretation of data beyond their pure face value while, on the other hand, it also allows plural causation to be considered[49]. This is particularly important for this study since the proposed thesis is that not only international legislation, such as TRIPS, influences national copyright laws, but rather that regional organizations have a significant impact upon them. Further, a qualitative research method allows several theoretical concepts to be taken into account in order to best evaluate these impacts and to conduct an analysis which is more than a pure overview and more than a specific case study.

In order for this research to truly have the ability to close the current gap in knowledge and awareness, comparative analysis of legislation and jurisprudence from three distinct national case studies as well as regional and international agreements will be employed[50]. Apart from the utilization

[48] "Reliability and Validity in Qualitative Research", J. Kirk and M.L. Miller, 1986, Beverly Hills: Sage Publications

[49] "Qualitative Approaches to Empirical Legal Research", Lisa Webley in The Oxford Handbook of Empirical Legal Research, 2010, page 4

[50] "Qualitative Research and Evaluation Methods", M.Q. Patton, 2002, London: Sage Publications

of statutes and case law, the international and regional context will be examined based on the additional sources of reports, speeches and declarations. The importance of considering several nations and their link to regional cooperation and the international sphere provides great value in concluding a thesis that can provide benefits to a variety of countries in our globalized world.

The case studies that have been selected as subjects for this research have been chosen with the aim of providing a basis for research "that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident" [51]. Therefore the countries which will be utilised for this study have been chosen based on their membership of a regional organization or their independence and the relative experience they have in the international copyright framework. It has been my attempt to exemplify a variety of situations which allow the conclusions and implications of this research to be transferrable onto a wide sphere of possibilities. Therefore, the European Union will be utilized as a regional organization with a long standing history of legal harmonization and in which member states' copyright protection has been established for a considerable period of time.

The particular countries that have been identified as case studies for this research have been chosen because they exhibit several relevant characteristics, which provide a range of situations in which the hypothesis can be tested. The UK has been selected as an example due to its strong involvement in the creative industries and its strong position within the EU and the international sphere. In order to compare the implementation of TRIPS between developed and developing countries, the Andean Community will be taken into account. This exemplifies a regional union which has been created more recently by like-minded developing countries but has a sufficiently long existence as to provide a basis of data for legal comparison. Ecuador has been identified as a country which provides the opportunity to analyse the development of national copyright frameworks, in the context of pre- and post-WTO accession. The control case study has been identified as Chile, since it has been quite active internationally and

[51] "Case Study Research Design and Methods", R. K. Yin, 1994, Thousand Oaks, London, New Delhi: Sage Publications.

has a strong interest in the creative industries, but is not a full member of a regional organization; rather it relies on a multitude of bilateral trade agreements.

The selection of these regional and national contexts in order to analyse the TRIPS agreement in a more specific context and with particular emphasis on the influence that regional organizations might exert is also based on the consideration that benefit can be derived from employing a comparative law approach to these issues. This dimension of in-depth analysis and comparisons of distinct legal frameworks and their connection to the international sphere will be based on considerations of increased constitutionalization and the question of proportionality in the legal guidance through regional court decisions. Therefore, the comparative nature of analysis between several countries as case studies can be justified by increasing a ”common zone of impact”[52]. This approach is particularly relevant since “even a brief inquiry reveals that there are many examples of vertical legal borrowing between national and international law in practice[53]”. Further, to examine only one aspect of international copyright law, without consideration for regional or national implementation would lead to an incomplete understanding of the complex framework in which it operates. Consideration of the influence of institutionalization and embedded liberalism upon this understanding of legislation is essential in order to provide not only a general understanding but also a more detailed recognition of the different levels of application and impact of international and regional copyright law.

Therefore apart from basing this research on a qualitative interpretation of the gathered data, a comparative analysis will also be carried out. A comparative analysis can be characterized by two factors, an interest in investigating if and why observed similarities or differences in cases exist and secondly, reliance on data collection from two or more

[52] “Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law”, Aleksandar Momirov and Andria Naudé Fourie, 2009, 2 Erasmus L. Rev. 291

[53] “Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law”, J. B. Wiener, 2001, 27 Ecology Law Quarterly

cases, based on a common framework[54]. What is aimed to be examined through this research are the differences between the implementation of the common international copyright legislation, according to membership in a regional organization. Evaluation of the differences and similarities will follow based on the focus of the provisions for creators' rights and balancing provisions, such as exceptions and limitations. This will be compared in the context of how and when legal provisions were created or modified in response to international or regional changes. The high value of such a comparison can be found in the fact that the implementation of international agreements is often seen in isolation from regional legislation, especially in relation to developing countries' regional cooperation.

In order to test the hypothesis as to the role of regional organizations in the context of the implementation of TRIPS, and through this, to contribute to a better understanding of copyright frameworks, the following research is structured in three sections. The first section, consisting of chapters one and two, contains the theoretical framework for this analysis. This will provide a considerable understanding of which theoretical concepts are utilized in this research and the benefit that can be drawn from them. The second section of this research extends from chapters three to seven and provides a summary and explanation of the relevant data. Chapters three and four consider the international and regional framework of copyright protection, from an institutional as well as legislative point of view. Chapters five, six and seven then provide insights into the legal framework for copyright protection in Ecuador, the UK and Chile respectively. Throughout these chapters, continuous emphasis will be placed on issues such as regional influence and the balance between competing interests. The collected data set will then be analysed in chapter eight, through the comparative and qualitative approaches explained previously. The resulting conclusions and implications are finally illustrated in chapter nine, which then brings the third section, and with it this research, to a close.

[54] "The four varieties of comparative analysis: the case of environmental regulation", Chris Pickvance, Paper for Conference on Small and large-N comparative solutions, University of Sussex, 22-23 September 2005, School of Social Policy, Sociology and Social Research, University of Kent

Chapter 2

Theoretical Framework

The following chapter will look at different theoretical perspectives that may be used as a foundation for future analysis and understanding of the relationship between TRIPS, regional organizations and national legislative frameworks. The selection of these particular concepts takes into account that copyright protection contains an inherent conflict between the interests of the creator and those of the individuals which derive a benefit from its use. Therefore, copyright encompasses the struggle between favouring economic gains on the one hand and ensuring protection of social aspects on the other. The need for these two interests to be balanced against each other is an essential part of international, regional and national legislation, as they all ultimately affect the individuals involved in an increasingly globalized world of research, knowledge and culture. Due to this it could be detrimental not to place this struggle into a wider context while simultaneously also being aware of the difficulty of drawing precise conclusions from generalized arguments[1].

This chapter will explore three theoretical concepts that can be used to analyse and provide an understanding of the complex struggle of balancing the different copyright related interests at the different levels of a highly interconnected legal framework. Constitutionalization can be understood as providing an explanation of how the international legal framework functions, this is essential as both the regulatory and legal framework provide the boundaries in which actors can further their competing interests and in which states can safeguard their social priorities. Embedded liberalism provides a concept of why certain principles are

[1] The narrow focus of some scholars when looking at issues like embedded liberalism and globalization has been criticised in the "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society" by James Caporaso and Sidney Tarrow, November, 2007

encoded, or should be encoded within international and national legislation as it focuses on the tight connection that exists between economic markets and social welfare. The understanding of proportionality and with it the balancing of rights provides the link of how the different interests and resulting rights are applied and interpreted in practice by the institutions of the legal system, which therefore have a direct effect on the way individuals can use them to their advantage and protection. While the framework of these concepts is explained, particular attention will be placed on the issues vital for further analysis, such as the relevance of these three theoretical concepts to the international TRIPS framework and to that of the regional organizations as well as the particular situation of Latin America in this context.

Basic Concepts

a) Constitutionalization

Constitutionalization as a concept means the increased creation of international law that governs the creation, modification and enforcement of legislation that is applicable to all member states. As part of this constitutionalization, institutionalization is vital since it ensures that international organizations and legislation are supported by stable and efficient institutions. Both of these concepts provide an insight into the functioning and purpose of legislative structures, which are applicable to all levels of international legislation. This incorporates the understanding that a solid international legal structure can provide a solution to issues such as increasing disadvantages that one country is exposed to through the actions of another. International legislation and structures provide for legal boundaries in which nations and individuals ought to operate while also establishing institutions that oversee and resolve arising conflicts.

The increased international co-relations of globalization also require an increase in international law, within which international economic law has the purpose and ability to promote the exchange of goods, capital and ideas associated with globalization[2]. The understanding of these co-

[2] "A functional Approach to International Constitutionalization", Jeffrey L. Dunoff and Joel P. Trachtman, Ruling the World – Constitutionalism, International Law, and Global Governance, 2009

relations in international economic law are particularly relevant to the TRIPS agreement, as it regulates copyright protection and the distinct interests and rights it relates to in both economic and social relations. TRIPS sets out to harmonize international minimum standards for intellectual property protection. This became necessary because of the increased international trade in intellectual property and at the same time this agreement wanted to further promote the growth of that exchange through the requirements for protection of the associated rights across all member states. In addition, the increased demand for complex international law results in the demand for more constitutional norms that would regulate and facilitate the process of international law making[3] by treaties and negotiations in order to establish supplementary and regulatory laws. This highlights the importance of constitutionalization itself in providing and safeguarding a stable and expanding international legal framework.

The increased level of legislation can be interpreted in two ways; one as providing a barrier to free trade and markets by limiting the actions that are allowed to be taken, while on the contrary, it can also be seen as providing a more harmonized and predictable field for transactions to take place[4] especially in relation to copyright protection. Within TRIPS, these conflicting interpretations are often seen side by side, as it set out to provide a framework that facilitates international trade relationships through harmonization, while at the same time its provisions have to be implemented by individual member states, therefore to some extent limiting their legislative sovereignty and flexibility. This is one reason why the explicit aim of TRIPS to harmonize a legal framework also caused pressure to build up between countries with different interests and priorities, both in relation to economic and social aspects. The need for governing regulations and enforcement can be connected to the need for an additional institutional framework which oversees the formation and application of the law and which is apt (at least in theory) to mediate the arising conflicts and complications.

[3] This is also supported by the work of Dunoff and Trachtman, see reference number 2

[4] “Polanyi in Brussels: European Institutions and the Embedding of Markets in Society”, James Caporaso and Sidney Tarrow, November, 2007

Constitutionalization can be analysed in terms of functionalism, as this provides an understanding of the functions of the international legal system[5]. This functionalism also underlines the impact that it has on the international framework as well as on member states' legislation through the requirement of implementation and enforcement. In their analysis, Dunoff and Trachtman focus their attention on three essential functions for international constitutional norms. These consist of norms that 1) enable the formation of new international law (enabling constitutionalization), 2) those that constrain the formation of international law (constraining constitutionalization) and 3) norms that complete gaps in domestic constitutional law that have been caused through aspects of globalization (supplementary constitutionalization)[6]. They conclude that the main part of international law should be considered "ordinary international law", which does not fulfil any of those functions, while they explain that "to the extent that international norms constrain international legal or international organizational action, they should be considered international constitutional law"[7] in the form of constraining constitutionalization. This analysis by Dunoff and Trachtman supports the understanding of a "softer" approach to international constitutionalization, as it can be understood that the functional regimes of international law are aspects of a larger system and that therefore any existing gaps or issues are able to be addressed through implicit, rather than explicit, rules of hierarchical legal order, through forms of negotiations, conflict resolution and legal implementation.

While the international legal system as a whole is not able to complete all the functions found in a national constitution, due to its lack of a central international government or (democratic) decision making process that would be comparable to a national one, the broad and inter-linked international legal framework that extends to such a wide range of issues, from trade law to human rights and health concerns, imply that member

[5] Other approaches to analyse constitutionalization are for example; process and pathos approach as explained in "The Constitutional Significance of the Charter of Fundamental Rights", Antje Wiener, German Law Journal, 2001

[6] "A functional Approach to International Constitutionalization", Jeffrey L. Dunoff and Joel P. Trachtman, 2009

[7] Above reference number 2

states of the international community, particularly the WTO and its associated bodies, want to construct some sort of an overarching legislation that regulates matters relating to trade and development but also incorporates some means of conflict resolution and accountability before courts (such as the European Court of Justice or the WTO Appellate Body[8]).

When seeing the international legal framework as operating in terms of a supplementary constitutional function, the essential need for this system to be based on firm regulatory and enforceable principles that balance the benefits and detriments of the international market between different actors is very important. For example, it has been explained that "a primary function of jurisdictional rules is similarly that of shaping governmental incentives to achieve a greater internalization of externalities among political units: as Demsetz states, "no harmful or beneficial effect is external to the world.""[9] This statement underlines the fact that there is an important consideration in law towards providing a framework that has some ability to balance potentially negative impacts of international trade in favour of social welfare and stability. In particular, copyright legislation does not only have the purpose of safeguarding economic interests but also social needs. On a supranational level as well as within a national legislation, it is an essential tool to bridge the conflict between private benefits and detriments with social benefits and detriments, since it should weigh the creator's interests against those of the users and public[10]. In any legal system, this focus and support of balance does not happen from one moment to the next but rather involves a slow progress in which legislation provides the foundations of rights awarded and protected, courts than have to take the texts and apply them to the particular market and national

[8] Please make reference to chapter 4 in relation to WIPO and its responsibilities as part of the WTO

[9] "Economic Analysis of Prescriptive Jurisdiction and Choice of Law", Joel P. Trachtman, 2001, page 5

[10] The WIPO's recognition for this essential balance can be seen in statements and reports made by the Standing Committee on Copyright and Related Rights (SCCR), see for instance Inter-sessional Meeting on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities (WIPO/IS/VIP-PPD/GE/12), October 17 to October 19, 2012

priorities, then individual circumstances and needs are taken into account[11]. This is a complex process and different countries go through it at different paces, which complicates matters on an international level where everyone is assumed to be at the same level of legal harmonization and understanding.

Regional organizations are an essential link between the different legal and social needs of their member countries and the pressures of international cooperation, this is supported by the statements and analysis made in the following chapters. Regulatory jurisdictions, which provide boundaries and legal foundations to the market and individuals, are based on state preferences, which in turn reflect (at least in theory) the aggregate preferences of their citizens[12], therefore they are shaped by particular national understandings and necessities. This is especially relevant for the international and regional aspect of this analysis, since once preferences have to be expressed and set out in a wider scale than on a purely national level, the likelihood to need to strike some sort of compromise between competing preferences increases a great deal. By comparison, an exclusively centralized international framework would struggle to balance the distinct state preferences arising out of different values attributed to the effects of an international market. This can be seen as a reason for nations to aim for a trade connection and shared legislative provisions with others who value the results of international market participation in a similar manner to themselves, hence providing an incentive to form more regionalized agreements.

The increased and more detailed legal framework that can be generated by regional organizations, while taking into account particular preferences, the interests and needs of their member states, provides an increasingly predictable legal structure for actors to operate in. There is a logic and elementary connection between legal stability and predictability with potentially arising economic or social detriments. Legal and practical

[11] "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", James Caporaso and Sidney Tarrow, November, 2007, here they explain these steps in relation to the process of the EU legal system.

[12] This inter-relation has been also referred to in "Economic Analysis of Prescriptive Jurisdiction and Choice of Law", Joel P. Trachtman, 2001, page 14

predictability provides some stability for the actors involved in a market, while legal instability can lead to uncertainty within the market, causing actors to behave more cautiously which therefore leads to increasingly negative economic and social impacts[13]. Therefore, the more legal regulations and their enforcement through institutions is seen as being based on firm ground, the more predictable and stable the market becomes[14], based on this constitutionalization and institutionalization. Again, this would have knock-on effects in terms of social stability and development as it provides a harmonized and predictable system in which different actors can communicate and exchange goods, services and knowledge.

Once international or regional organizations would be given the necessary powers, they would become able to fulfil the associated functions while also being able to delegate authority to national governments when appropriate. This augmented co-operation and delegation would support the legislative foundations as well as the institutional operations needed for a stable market environment, as more reactive, efficient and detailed legislation and enforcement could take place[15]. To some extent this important application and function of constitutionalization can already be observed in relation to regional organizations, such as the EU and the Andean Community, as they possess more specific powers and also establish and operate under a system which fulfils the main functions of a constitutional structure to a greater extent, than currently does the international system.

The interconnection between the international and regional sphere of constitutionalization is also evident, since one of the essential arguments in favour of increased international legislation such as TRIPS is the need

[13] Such predictability is important in two situations, first ex ante – where actors are able to reconcile their behaviour prior to an act, while secondly ex post – actors are able to predict the consequences after an act, therefore enabling them to position themselves in a way that most likely separates them from negative (legal) consequences of their actions.

[14] This understanding is supported by Trachtman's statement that an international or regional organization might be more apt to deal with prescriptive jurisdiction,

[15] according to Trachtman in his article reference under number 12

for predictability for the operation of international trade systems. In order to achieve this increased legal and market predictability the harmonization of the international legislative structure is essential. Trachtman explains this concept of harmonization and legal predictability in relation to the EU by stating that it "often engages in essential harmonization, as a predicate to mutual recognition, to forge the single market. Before agreeing to mutual recognition, they agree on a minimum level of regulation that will insulate their home regulation from being reduced in unacceptable ways."[16] Therefore, the increased constitutionalization and institutionalization of regional organizations goes hand in hand with the understanding of concepts, such as predictability, state preferences and national regulatory aims, and their importance for stability, growth and development of member countries.

When talking about the importance of international and regional law as well as the aspects of a constitution that they may fulfil, it is also vital to consider on what basis such binding and overarching legislation, such as TRIPS and other international treaties, are formed in the first place[17]. The social and political context in which the negotiations and preparations for these legal texts are made can hardly be separated from the final product, since ideas, principles, concepts and categories are directly transferred into international treaties. The different levels of expert knowledge and engagement during negotiations can result in a situation where, in the past, such as during GATS or TRIPS negotiation rounds, many "countries were unsure of the real implications of making commitments"[18] due to lack of information. The incorporation of particular knowledge, perspectives and interests can also be seen in TRIPS, for example it provides for extensive obligations to protect the creator's rights but made no mirroring provisions for the obligation to include specific exceptions; these are left to each country to establish them how they see fit. International trade law not only restricts the freedom of governments but also facilitates the production of

[16] "Economic Analysis of Prescriptive Jurisdiction and Choice of Law", Joel P. Trachtman, page 68

[17] "Legal Regimes and Regimes of Knowledge: Governing Global Services Trade", Andrew T. F. Lang, 2009

[18] As stated by Andrew Lang, see above reference, page 14

governments which share particular understandings and preferences[19]. A crucial consideration in relation to copyright protection is that it is not only connected to the economic interests of creator's and creative industries but also it should provide necessary accessibility and utilization by the public in order to aid social developments. While constitutionalization and institutionalization provide an understanding of the function, importance and impacts of international law, it is also essential to inquire about the basis for the values, interests and needs incorporated into them.

b) Embedded Liberalism

To understand the importance of a legislative balance, one must consider the particular preferences and needs incorporated within the international legislative systems. One theoretical concept which explains well the different trade-offs and compromises relevant to international trade and, therefore, international law is embedded liberalism. Embedded liberalism can be understood as an essential and time-specific compromise that nations enter into in the international system; namely, the understanding that economic liberalization is embedded in social community[20]. The connection between trade and non-trade aspects of embedded liberalism is essential since it highlights the fact that economic markets do not and cannot operate in isolation from social welfare and developments. This compromise is entered into at a particular point in time by nations to support economic growth through trade[21]. Ruggie retraced the origins of embedded liberalism to the demise of the hegemonic theory as well as this then also replacing the previous system of laissez-faire understanding to international collaboration[22]. In later years, the concept of

[19] "Legal Regimes and Regimes of Knowledge: Governing Global Services Trade", Andrew T. F. Lang, 2009, page 35

[20] "Taking Embedded Liberalism Global: The Corporate Connection", John Gerard Ruggie, 2008

[21] Andrew Lang has written a clear summary and explanation of Ruggie's initial work that proposes that this compromise is at the heart of the post-WWII international system. "Reconstructing Embedded Liberalism: John Gerard Ruggie And Constructivist Approaches To The Study Of The International Trade Regime" Andrew T. F. Lang, Oxford University Press 2006

[22] This can be seen in Ruggie's articles, for instance in "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order", John G. Ruggie, 1982, International Organization 379

embedded liberalism has been employed in a variety of different arguments and has also evolved and adapted in accordance with changing circumstances on the international level[23].

The international community increasingly needs to develop a system which would promote trade openness while also having to incorporate some forms of state intervention which would balance any detriments caused through this increasingly open market. Once again this might be a challenge better faced by regional organizations rather than by the general international trade community and legislation. A particular challenge which can be observed in relation to the construction of such an international system is the correct provisions of flexibilities, checks and balances for states to operate to the benefit of their economic and social preferences, while simultaneously keeping protectionist measures to a minimum. GATT has been identified as one international agreement whose structure is aimed at incorporating some form of embedded liberalism into the international community[24] and therefore can improve the availability of checks and balances.

Embedded liberalism underlines the vital connection between trade and non-trade aspects in the global regime, which are based on a common social purpose[25] and therefore provide a contrast to the understanding of a purely neo-liberal theory. Ruggie states that "the core principle of embedded liberalism is the need to legitimize international markets by reconciling them to social values and shared institutional practices"[26]. The idea that economic markets are deeply embedded into society is essential to the understanding that supranational legal conflicts and struggles revolve

[23] See for instance explainains contained in "Reconstructing Embedded Liberalism" Andrew T. F. Lang and "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi E. Abdelal and John G. Ruggie, New Perspectives on Regulation, page 151–162. Cambridge, 2009

[24] "The Death of the Trade Regime", Jeffrey L. Dunoff, 1999, page 6 similar considerations can be transferred to TRIPS

[25] "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order", John G. Ruggie, 1982, International Organization 379

[26] "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi E. Abdelal and John G. Ruggie, New Perspectives on Regulation, page 151–162. Cambridge, 2009, page 153

around the question of how to bridge the different state priorities and interests which are highly dependent on what economic benefits they seek to achieve and what social needs they want to protect[27].

The legitimization of a legal system requires a harmonization in the rules that govern the action of different actors in the international trade market, whose rights have in the recent globalization "outstripped" the international frameworks designed to regulate them[28]. Therefore, increased legal frameworks ought to be strengthened in their purpose to not only award rights to certain interest groups, but also set out clear structures and limitations on their powers. These ought to also provide support to national legal systems, as to how best to deal with situations of industry pressures and social priorities. The importance of balancing markets, on national and international levels, is particularly relevant since that ensures the sharing of benefits and detriments inherent to globalized markets across different societies while also ensuring that multilateral collaboration is at the heart of international governance[29]. These core principles and ideas can easily be transferred to the understanding of the international copyright framework, as this is also a part of the globalization of trade and it also causes gains and losses, depending on how and when it is employed. The need for this system not only to be based on economic considerations but also to take into account the social preferences that need to be supported by national and regional legislation is clearly paramount.

Recently, some have questioned the relevance of embedded liberalism in today's world, arguing that there are many protectionist measures, which appear contrary to the principles of this theory[30].

[27] This struggle between economic benefits and social considerations has also been mentioned by James Caporaso and Sidney Tarrow in "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", November, 2007

[28] This is supported by arguments in "Taking Embedded Liberalism Global: The Corporate Connection", John Gerard Ruggie, 2008

[29] This understanding of an essential balance is supported by Ruggie in many of his works, including the article mentioned in reference number 26

[30] "Reconstructing Embedded Liberalism: John Gerard Ruggie And Constructivist Approaches To The Study Of The International Trade Regime" Andrew T. F. Lang, here he makes particular reference to works like E. B. Kapstein, 'Workers and the World Economy', 75(3) Foreign Affairs 16 (1996); J. Bhagwati, 'Fear Not: The Global Economy and American Wages', The New

However, there are several considerations which can be used to counter such an argument. For example, Ruggie explains that some "softer" forms of national protectionism are expected within this system[31], since governments take on the role of weakening the negative externalities arising from trade liberalization through public policy measures, some of which might be somewhat protectionist in character. The interpretation of embedded liberalism in terms of a progressively changing, developing and evolving compromise, which is not set in stone is an attribute to the need of this concept to grow due to challenges faced by the international community in this new age of transactions, exchanges and social needs[32]. This flexibility is essential for any concept that aims to provide an interpretation of international principles, due to the fact that a rigid understanding would be increasingly outdated and no longer provide an underlying foundation to interpret and analyse the actor's behaviour.

While this concept of embedded liberalism might not have the perfect answer to every question, and neither does there appear to be any other concept that has that ability, there are clear benefits that can be derived from its utilisation in an increasingly inter-connected and inter-dependant global market. In response to these challenges, Ruggie's perspective at the onset of embedded liberalist theory could be interpreted as follows: that the model of embedded liberalism can only survive not through mere "'renegotiating ... forms of domestic and international social accommodation"[33] but rather it calls for an awareness of finding a compromise between the two essential pillars of this model[34]. This necessary awareness is equally vital for the continued stability of international and regional organizations within the global system. The

Republic 36 (1997) and R. O. Keohane, 'The World Political Economy and the Crisis of Embedded Liberalism', in J. H. Goldthorpe (ed.)

[31] J. G. Ruggie, above reference number 28

[32] This view can also be seen in "The Death of the Trade Regime", Jeffrey L. Dunoff, 1999

[33] "Embedding Global Markets: An Enduring Challenge", John G. Ruggie, page 20

[34] "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order", J. G. Ruggie, 36 (2) International Organization 379, 1982.

absence of a global government, which can act on behalf of the common good, is part of the origin of the current problems for embedded liberalism[35]. Although the creation of a global government might to some extent soften these conflicts, the creation of such a government is nowhere in the future and would have other considerable detriments[36], such as the diminished possibility of taking into account individual countries' preferences and social needs as well as challenges in relation to democracy and decision making processes.

The effectiveness demonstrated by international organizations to encourage trade liberalization has surpassed that of purely supporting regional and national institutionalization. International organizations have also been successful in creating legislation and regulations that allow temporary exemptions to such trade openness when the national markets are in need of additional support.[37] This interpretation could lead to the conclusion that the most beneficial way to ensure stable international markets is their regulation in accordance with embedded liberalist principles. Regional organizations are a useful interconnection between international and national law as well as institutions, as they provide the possibility for their members to voice their preferences and needs when making provisions for the incorporation of international obligations into regional and therefore member states' law. During the last twenty-five years, we have seen a lot of developments in international governance, with the formation of the WTO and its associated agreements as well as bodies, again exemplifying the need to consider the link between increased constitutionalization and the social preferences inherent in international and regional economic markets as well as legal frameworks.

c) Proportionality; balancing different rights against each other

Constitutionalization is essentially a concept which helps to explain the way in which aims and preferences are converted into rights; it is

[35] "The Corporate Connection", John Gerard Ruggie, 2008

[36] The possibility, however, of a several regional organizations coming together to act could be more feasible.

[37] This is explained well in "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi Abdelal and John G. Ruggie

essentially concerned with the functional creation and administration of rights. On the other hand, the essential compromise at the heart of embedded liberalism is the concept which shows what ought to be established in legal rights, namely the incorporation of social considerations within an economic market. While the lessons derived from constitutionalization and embedded liberalism are relevant and applicable in their own right, proportionality and its principle of balancing rights bridges these two, because it links the rather theoretical functions of constitutionalization and basic aims supported by embedded liberalism, to the practical interpretation and application by international, regional and national courts and legal institutions.

There is a link between the establishment of constitutional rights and the consideration of balancing, as stated by Robert Alexy; "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other"[38]. Constitutional norms therefore have to be balanced against others in relation to the priorities assigned to them; this is equally true in a national, regional or international setting. In order for a law to fulfil its function of legal certainty and legal efficiency, there must be this necessary connection[39]. The justification of constitutional rights per se, as a species of moral discourse, also establishes a necessary connection between law and morality. The requirement for laws, that are created and enforced through constitutionalization and institutionalization, not only to support the interests of certain actors, but also to take into account those of others, is what lies at the heart of morality. This factor ought to be expressed through the establishment of adequate exceptions and limitations that benefit a truly balanced system and this is applicable as much in general as specifically in relation to copyright protection.

A vital consideration when applying this principle not only to the national constitutional framework but also to the international legal structure is that different member states have different priorities assigned to their competing rights and that therefore overarching guidance on the evaluation

[38] "Constitutional Rights, Balancing and Rational", Robert Alexy, 2003, Ratio Juris. Vol. 16 No.2 June 2003 (131-40), page 6

[39] This is well explained by Matthias Klatt in "Robert Alexy's Philosophy of Law as System"

and application of rights becomes more relevant. It can be understood that all legal interpretation, and therefore the balancing of rights is to some extent political, as the state shapes the legal frameworks on which courts base their decisions based on their individual needs and preferences, while simultaneously courts' decisions influence how citizens of a particular state see and understand the law[40].

The idea of rights balancing, which is an important part of proportionality, is also strongly connected to the principles of embedded liberalism because embedded liberalism advocates a compromise between the different considerations of an economic and social nature upon which legal rights ought to be founded and implemented within a legal system. As explained previously, Ruggie's theory can be understood as representing the need for laws to take into account the different competing interests of the actors to which they apply[41]. The concept of legal proportionality is paramount to the legislation but it is also connected to different priorities placed on rights and interests[42].

Constitutional norms and legislation are based not only on economic rights protection but also social priorities and development. These social preferences are built on the moral values supported in a culture, legislation and international framework. Economic rights are not only subject to economic analysis in terms of balancing and evaluating different interests[43] but also the application of proportionality in weighing distinct legal principles against one another. This in turn is connected to the understanding of economic rights under the embedded liberalist view, in that it supports that economic rights do not operate in isolation from other interests and values that have to be protected under law, and

[40] For instance see "The New Terrain of International Law", Karen J. Alter, Princeton University Press, 2014, pages 32-67 and 335-366

[41] Statements indicating this can be found in "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order", J. G. Ruggie, 1982, and "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi E. Abdelal and John G. Ruggie, both referenced previously.

[42] See for instance the explanations in "A Theory of Constitutional Rights", Robert Alexy, 2002

[43] "The History of the General Principle of Proportionality: An Overview", Eric Engle, referenced above

proportionality can be seen as the principle employed to balance these contrasting preferences.

The need for competing rights and priorities to be evaluated against each other is especially relevant in relation to the complex factors at play in relation to copyright protection, where the rights of the creator are competing with those of the larger public and user interests. It is essential for the legal rights that are formulated and enforced in a legal system to take into consideration the social needs and preferences which are necessary to be incorporated in order for a legal system to be balanced in nature. This balancing of rights is a frequently expressed aim in international and national legislation[44], and illustrates the recognition, in general, of the need for social aspects to be incorporated into a legal framework. However, the sole establishment of some balancing provisions within legal texts is not sufficient, as it is just as important for courts and institutions to then interpret and compare these provisions. In order for the courts to resolve a conflict between different competing rights and interests these have to be balanced against each other, for which purpose courts mainly use the principle of proportionality, including rights balancing[45].

A further important connection can be made between the concept of proportionality and the idea of principles. For example, Alexy states that the nature of principles can be deduced from the concept of proportionality with its three essential sub-principles of suitability, necessity and the balancing requirement[46]. This is a relevant connection since legal rights are based on precepts and social preferences[47], which both have to be taken into consideration.

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[44] For example TRIPS preamble recognizes the importance of public policy objectives in relation to intellectual property protection on page 2

[45] This can be seen for example in the application of proportionality by the ECJ and has strong resonance with the theories and concepts explained by Alexy. For example see: “A Theory of Constitutional Rights”, Robert Alexy and “The History of the General Principle of Proportionality: An Overview” Eric Engle

[46] “A Theory of Constitutional Rights”, Robert Alexy, 2002, Oxford University Press, page 66

[47] As it has also been identified by Trachtman in relation to the international legal system, “Economic Analysis of Prescriptive Jurisdiction and Choice of Law”, Joel P. Trachtman, 2001, refer to above explanation

The concept of proportionality and its three sub-principles have been applied by several national courts and the European court based on the three-step test in order to see whether there has been a violation of rights. This involves looking at the issues of suitability (whether the means are suitable to achieve the wanted ends), necessity (whether the ends can be achieved using less extreme measures) and the concept of balancing (whether the measure infringes more on a right than it ought to). Alexy highlights the distinction between the concept of balancing, which is determining what is legally possible with necessity and suitability which involves analysing what is factually possible[48]. In terms of the purpose of this study, the understanding of rights balancing as part of the concept of proportionality is essential, as it gives an insight into the complex perspectives necessary for the interpretation of enforcement of legal structures across a variety of situations which are based on distinct priorities and competing interests. Proportionality is therefore an internationally relevant and established concept which has been widely applied in regional organizations such as the EU[49].

Essentially, when talking about the concept of proportionality there are two distinct but interconnected principles at work, namely the one of interest balancing (in terms of political and non-justiciable) as well as that of legal proportionality (in terms of legal and justiciable). The concepts of legal proportionality and interest balancing are not one and the same; the first looks at how the means can achieve the wanted ends, while the second looks at balancing different rights and preferences against each other[50]. Therefore, the first understanding of proportionality is of particular interest in relation to constitutionalization and its role in establishing legal rights that balance and reflect the competing interests expressed in the idea of embedded liberalism, while the second notion is relevant to the practical interpretation and weighing up done by courts when they review competing laws against each other. However the balancing of preferences forms part

[48] Above reference to Alexy's work under reference number 45, page 67

[49] "The History of the General Principle of Proportionality: An Overview" Eric Engle, The Dartmouth Law Journal, Vol. X:1, 7 July 2009

[50] This is also explained in Engle's article mentioned in reference number 49.

of the test for proportionality in legal applications[51].

In essence, proportionality refers to the need for legal and administrative actions to be no more excessive or restrictive than necessary to achieve the legal ends, while also balancing the different needs for economic protection and social developments. This is an important consideration for the operation of regional legal systems and without doubt this essential concept of proportionality in connection with both constitutionalization and embedded liberalism, is also important for the international framework and TRIPS, therefore this relevance will be further examined in the next parts of this chapter, which will look at the way in which these theoretical concepts are implemented and interpreted in the specific circumstances of the wider international trade system as well as in the more specific context of copyright enforcement.

The practical interpretation of proportionality by courts in this context will be limited more towards the application by national courts, as it goes beyond the scope of this particular research to conduct an additional in depth analysis in this context of the WTO appellant body rulings. However, the importance of balancing different rights against another is also evident in the context of embedded liberalism and will be mentioned repeatedly in connection with this related concept and the international framework.

So what does this mean for the international framework?

i. Constitutionalization

Once the previously examined concepts are understood, it is essential for them to be applied in more detail in relation to the international legal system, as, in an increasingly interconnected global economy, it is necessary to establish and strengthen international institutions and regulations which not only support but also oversee and limit global

[51] As it can been seen from Alexy's article, reference number 45

capitalist markets for the benefit of social developments and individual needs[52].

Three main reasons have been identified for the imbalance that can be seen in the production of different types of international trade law, first: lobbying by business often influences governments to act in their benefit, second: liberalization itself causes the recognition of gaps in the legislative framework as well as the potential of adverse regulatory arbitrage, third: as explained in embedded liberalism, liberalization has a distributive effect which need to be stabilized through regulatory redistribution[53]. The first instance is damaging to a balanced system because it causes the legislative focus to shift in benefit of certain industrial preferences. Extensive provisions for creators' rights and creative industries are part of the current imbalance of the international copyright framework. In relation to the second case, emphasis should also be placed on the fact that increasingly harmonized international law is required to cover the additional areas touched by trade liberalization, since legal harmonization provides some extent of common legal security.

The extent of legal harmonization on an international level has a limit on how much redistributive impacts it can have, due to the difficulty in combining and considering all the different preferences and particular needs for stability by such a vast number of member countries. To further understand the imbalance, but also the potential of international constitutionalization, it ought to be remembered that, constitutionalization can be based on three essential functions, namely "enabling", "constraining" and "supplemental" constitutionalization. This framework of interpretation can be applied to the WTO[54]. In particular, the question of the Appellant Body's effectiveness is clearly relevant and could support the

[52] This understanding is also relevant to regional organizations, as shown in "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", James Caporaso and Sidney Tarrow, November, 2007

[53] For instance by Trachtman in his previously mentioned article under reference number 47

[54] This is well explained and employed in "The Politics of International Constitutions: The Curious Case of the World Trade Organization", Jeffrey L. Dunoff; published in: Ruling the World – Constitutionalism, International Law, and Global Governance, 2009 with the result that there are little indications for a firm constitutional character of the WTO.

perception of inequality of power and ability of member states within the WTO, in terms of incorporating their voice and interests into the negotiations, treaties and institutions of the WTO[55]. The importance of the role it plays as an institution for the interpreting and enforcing of international trade legislation cannot be ignored. As an international court, its interpretations and rulings are a vital guidance for member states and do not only impact their behaviour and understanding on an international level, but also shapes their application and enforcement of international legislation within their national boundaries.

Authors such as Trachtman have thought that the formation of "enabling international constitutionalization" is based on globalization and the related need to create new legal rules to cover newly arising areas of concern or to fill existing legislative gaps.[56] It has been argued that there is a real danger that such enabling constitutionalization[57] in the context of the WTO "would mean the end of the WTO as a member organization in which each member (in formal terms) retains veto power"[58]. This is due to the difficulty of awarding every member country with a clear voice and equal possibilities for participation in the process of creating more constitution such as legal texts, therefore some opinions and preferences may be over- or underrepresented in international negotiation and therefore constitutionalization.

However, this is not necessarily a problem of enabling constitutionalization as such but rather it is a particular issue in relation to the current processes employed by international organizations in order to create legislation. This could potentially be remedied by ensuring a wider spread of knowledge and awareness across member states prior to negotiations as well as taking particular care to incorporate the preferences

[55] "Legal Regimes and Regimes of Knowledge: Governing Global Services Trade", Andrew T. F. Lang, 2009,

[56] "Constitutional Economics of the World Trade Organization", Joel P. Trachtman, published in: Ruling the World – Constitutionalism, International Law, and Global Governance, 2009

[57] Enabling constitutional provisions refer to those international constitutional provisions that enable the formation of new international law.

[58] Well explained by Trachtman in the above mentioned reference number 47

and priorities expressed by developing countries. In addition, it has been argued that there is a clear link between the constitution of the WTO and the member states' constitutions, since international laws need to be implemented and enforced within national legislative systems[59]. This is an important consideration because the power that international law has is directly linked to the way it is implemented and enforced through the legal system of its member states. One purpose of international economic legislation is to achieve a harmonized legal basis that facilitates trade, knowledge and cultural exchange. This can only be achieved if member states implement this international law within their national frameworks. The importance of regional organizations for this process of implementation and the possibilities as well as challenges faced by them, is closely connected to international legislation and national legislation; therefore it acts as some sort of bridge for the legal and constitutional aspects of both.

While the WTO as a whole lacks some of the characteristics required for a legal framework to be elevated to a constitution, there is strong evidence that constitutionalization in the form of institutionalization has progressed significantly over the past few decades and is now a vital attribute of the international trade system as it provides some stability and predictability. Dunoff recommends that "we should understand discussions of the WTO's "constitution" in a metaphorical, rather than a literal, sense". Such a metaphorical interpretation is beneficial as it does not require the analysis of the international constitutionalization to be pressed into the format of national constitutions, but rather it allows the WTO system and legislation to be understood as part of a wider legal framework which influences member countries across the globe. This consideration of the wider and complex international structure provides a fundamental link to the concept of embedded liberalism; because it shows that while trade liberalization at an international level is an important factor, the framework stretches beyond simple trade liberalisation, to establish certain norms of conduct and to cushion negative impacts.

The high potential for abuse of these measures for trade liberalisation by industrial nations to the detriment of developing countries has already been mentioned previously and remains an important

[59] Same as reference number 47

improvable characteristic. It is not only important to link the international legislative structure and institutions with the embedding of social principles and priorities within them but also to highlight the function of international institutionalization in guiding and safeguarding certain values above others. The importance of understanding the international legal system not just as a mere construct that supports the interests of its stronger members but instead also recognizing its responsibility to indicate and, when necessary, to safeguard certain social developments of the international community is immense. In relation to copyright protection, the attempt of the international institutional community to give such vital support to the needs of society is the involvement of WIPO with its member countries to implement particular exceptions and limitations into a global protection system[60].

Another important observation is that further additional laws and trade liberalization are closely connected; through an increase in global markets based on trade liberalization, there is an increasing necessity for international law that governs and oversees its operation, while there are also requirements arising for positive as well as negative integration. Yet, while trade liberalization is built on the harmonisation and stabilisation supported by international legal agreements, some critique has arisen in relation to the imbalance of production of different types of international law. The competing interests and strengths of different actors within any legal system necessarily causes friction and requires relevant institutions to deal with such in an adequate manner. This challenge is wide-reaching and complex on an international level; however, this is not necessarily a reason to stall or abandon the progress towards creating more able legal structures and institutions to deal with such constitution-related issues. At this point, it is important to highlight the supremacy of WTO law over national legislation; treaties such as TRIPS therefore have to be implemented and enforced in member states and, therefore, the interconnected structure of international, regional and national law is once again apparent.

[60] See for instance the “Proposal by Brazil, Chile, Nicaragua and Uruguay for work related to exception and limitations”, 17.July. 2008 also the collaboration with the International Federation of Library Associations and Institutions “Treaty Proposal on Limitations and Exceptions for Libraries and Achieves”,6.December 2013 and the “Draft Text of an International Instrument/Treaty on Limitation and Exceptions for Visually Impaired Persons/Persons with Print Disabilities”, 22.February 2013

Embedded liberalism can be seen as a mechanism for the redistribution of benefits from trade liberalization for those who would otherwise suffer detriment from globalization. This understanding of the inter-connectedness of different concepts and their combined effect on the international legal framework as a whole can easily be transferred to the understanding of TRIPS and its wish for regulatory legislation while still seeking to find its feet in relation to the aspects of stabilization and redistribution. While several authors[61], agree that the international legal system cannot be interpreted as a fully formed constitution in the traditional sense, the importance of the supra-national influence this legislative framework exerts cannot be ignored. If one were to conclude that international treaties such as TRIPS do not, at least to some extent, form part of a cross-border hierarchical system that ought to be respected and implemented by member states, than it would not be reasonable to continue with the creation of international legislation, because no value would be attached to its existence.

In the setting of a regional organization, the legislative and institutional framework might well be much more connected with the traditional understanding of what is a constitution, while the international system faces challenges beyond those ever to be expected by national or regional legislation, such as the difficulty of finding consensus among all member states or the issue of balancing their different backgrounds and interests. Some of these challenges have been mentioned above and while there are currently no clear-cut solutions for all of them, one should not ignore the fact that continued negotiations and legal developments are taking place.

ii. Embedded Liberalism

The vital balance entrenched into the embedded liberalist compromise is not achievable when the legislative framework is not sufficiently strong to support both its social and economic spheres. On an international level, this balance is not evident, since the rules for market expansion have grown stronger while the rules for social objectives have

[61] Dunoff, Trachtman, Kalderimis, Steinberg and others named in this chapter

mainly weakened[62]. TRIPS is a clear example of the increase in regulation for international trade. It provides far-reaching protection for copyright and economic derivatives of their work, but only provides for non-obligatory exceptions for the benefit of social interests, which WTO member states can (not must) implement into national legal frameworks. As will be shown in the later sections of this work, regional organizations have however utilized the flexibility of this international treaty in accordance with their priorities and policy aims. Similar to other areas of international law, the differences in national legislation for copyright law of the member states often cause conflict between different international actors and interest groups. From the perspective of many developed nations, there are questions arising out of their background, legal interpretation and application of the scope of copyright protection granted as well as potential issues of enforceability, these can include problems in terms of unfamiliarity with the impacts of legislative changes and limited experience with the application by the institutions. On the other hand, developing nations often want to protect themselves against the abuse of monopoly powers from industry[63].

The embedded liberalist compromise is closely connected to globalisation and multilateralism[64], as these are the driving forces behind modern day economic markets and countries' ability to protect their citizens against any resulting negative impacts. It has been argued that the increased sense of legitimacy awarded to decisions which are based on multilateral considerations and negotiations outdoes that granted to unilateral decisions[65], as the first have an increased and more frequent interest in taking account not only of short term impacts but also long term effects, while simultaneously safeguarding nations from being coerced into an agreement or decision which they might not be able to support, due to

[62] "Taking Embedded Liberalism Global: The Corporate Connection", John Gerard Ruggie, 2008

[63] "The Death of the Trade Regime", Jeffrey L. Dunoff, 1999, page 10-11

[64] "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism". Rawi Abdelal and John G. Ruggie, Page 3

[65] "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi Abdelal and John G. Ruggie, page 10

providing trade alternatives and stability through commitments for mutual collaboration. This is an important idea, since it explains the foundations on which international institutions and regional systems are based, namely striving for common ground through negotiation and compromise. However, it can be argued that globalization and, with it, international treaties such as TRIPS often fail to take into account developing countries' perspectives as much as they ought to[66]. A particularly striking example of this argument is the report of the World Commission on the Social Dimension of Globalization[67] which states that there is a profound imbalance within the current international economy which in turn requires the incorporation of more social values within the globalization of markets.

Regional organizations may be more prone to make decisions that are perceived as legitimate in order to support the needs and wants of the smaller number of member states and therefore supporting the embedded liberalist connection of economic liberation and social development. This increased potential of regional organizations could be connected to their having fewer member states' needs and preferences to consider and their having the ability to establish and apply more detailed and specific legal provisions which govern on a supra-national level while also influencing national legislative provisions. As previously mentioned in relation to constitutionalization, the conflicting interests that are advocated by different member states are also a vital point of international collaboration, as they provide opportunities for different perspectives to be heard and considered. The continued awareness and effort of the international institutions to address this imbalance is essential for the creation of more equal voices within the system, no matter whether this is agreed as being based on the concept of embedded liberalism or not[68].

[66] Some authors which have expressed criticism of TRIPS and/or TRIPS plus agreements are for example; Correa, Dutfield and Vaidhyanathan.

[67] "A Fair Globalization: Creating Opportunities for All", World Commission on the Social Dimension of Globalization, February 2004, available at http://www.ilo.org/wsdg

[68] The proposal by Brazil, Chile, Nicaragua and Uruguay (and others who joined later) for additional exceptions is an example of member countries involvement for the creation of a more balanced system

What can be drawn from this for Regional Organizations?

i. Constitutionalization and Proportionality

There are two concepts which ought to be considered in relation to constitutionalization in the context of regional organizations, namely constitutional pluralism as well as constitutional heterarchy. Constitutional pluralism can be defined as the coexistence of several legal constitutional systems which operate parallel to each other. A more formal definition of constitutional pluralism can be given in relation to the EU as "the phenomenon of a plurality of constitutional sources of authority that create a context for potential constitutional conflicts between different constitutional orders to be solved in a non-hierarchical manner" [69]. This relates to the consideration of legal heterarchy in the sense of non-hierarchical legal structures. Constitutional heterarchy on the other hand refers to a situation where there is a horizontal rather than a vertical relationship and exchange between constitutional systems.

The concepts of constitutional pluralism and heterarchy are relevant only to the extent that there is currently not only an increased international constitutionalization and institutionalization taking place, but simultaneously regional organizations and their member states operate in a system of competing legal systems and simultaneously create a form of legal heterarchy[70]. While for this research and analysis it is being proposed that there is an inter-connected relationship, rather than purely parallel operating systems, one ought to be aware of the fundamental consideration that pluralism proposes. Halberstam's specific definition of a constitutional heterarchy is it being "a system of spontaneous, decentralized ordering among the various actors within the system" which also "reflects the idea

[69] "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism", Miguel Poiares Maduro, published in: Ruling the World – Constitutionalism, International Law, and Global Governance, 2009, page 1

[70] "Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States", Daniel Halberstam, published in: Ruling the World – Constitutionalism, International Law, and Global Governance, 2009

that the coordination among the various actors is based on constitutional considerations, that is, in the values of constitutionalism itself". This can be understood in the sense that regional organizations express constitutionalization, through a decentralization of legislative and institutional structures. For the purposes of this study the decentralized and constitutional considerable character of a heterarchy are the main factors of consideration, as they provide an overview of the specific and theoretical functioning of constitutionalization within regional organizations.

An example of constitutional heterarchy can be seen in the functioning of the European Union and the US federal government. The concept of legal heterarchy is explained well in relation to the "constitutional pluralism" in the EU as entailing a complex relationship of mutual recognition and occasional conflict between a multitude of constitutional systems and legal frameworks. EU and US systems are centred around three principle values; these are "voice, expertise and rights". It follows that "if an actor can maximize all three values in any given case, that actor's claim to authority within the system becomes paramount."[71] The EU institutions can also be seen as mediators between different interests that have to be combined in relation to regional policy decisions and the formation of legislation, particularly the European Union courts play an important role in the embedding of social principles and interests into the functioning of an internal and interconnected market. In this context, the EU is not only a regional organization which creates a market but it simultaneously regulates and adapts it[72]. This can be interpreted as both a blessing and a curse as this plurality on the one side creates tension between different interests but on the other side it ensures a constant re-evaluation and progress of norms and regulations, which adapt to the different economic preferences and social needs of the times. While the development of European plural constitutionalization can be seen as evolving independently from the constitutionalization of international law, it does not operate in complete autonomy, such as in the context of the TRIPS agreement.

[71] Halberstam's article referenced above.

[72] "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", James Caporaso and Sidney Tarrow, November, 2007

The concept of legal inter-connectedness also has an important influence on regional courts and their work in legislative enforcement as well as proportionality. Since national courts no longer just have to take into consideration the national laws and regulations but are instead also responsible for considering guiding principles and decisions of regional and international laws and interpretations. This influences the role of the courts on a regional and national level as well as their interpretation and adjudication[73]. The higher level of integration on an economic and political sphere has made increased international legal regimes and jurisdictional expansion necessary. Another point in relation to external pluralism is the fact that different courts, be it on a regional or international level, might compete either on the interpretation of similar legal points or on the quality of decisions. In addition, there is also a constant "cross-fertilization of legal concepts" between different legal frameworks, based on the growing international frame of economic law and litigation as well as on the circulation of legal concepts and understandings through networks across different legal cultures[74]. This is particularly relevant to the role that regional organizations have in order to help their member states' legislature and courts with the interpretation of international obligations, such as those contained in TRIPS.

In terms of the practical implications of how the concept of constitutionalization applies and influences regional organizations law and institutions, it is paramount for national courts to receive the adequate guidance and knowledge when they are being asked to base their decisions on such a multitude of legislative information because the central function of the courts to act as balancing institutions between different rights and interests becomes all the more important. This balancing in rights and interests is an important institutional reflection of the principle of proportionality through the courts on a regional level. It is precisely this balancing act which is a vital aspect in relation to the adequate balance that needs to be struck within a regime for copyright protection, particularly

[73] In relation to this, Maduro explains the complex relationship that exists, similarly to previous explanations made by Trachtman in "Constitutional Economics of the World Trade Organization", Joel P. Trachtman

[74] "Courts and pluralism", M. P. Maduro, see reference number 69

when institutions have to consider the complex legal framework which surrounds them. It is important not to lose sight of the need for copyright to benefit both the creator and the users of knowledge and culture. However, the overall benefit of regional courts and institutions to provide a certain support and guide to national institutions makes this complex situation of legal pluralism more predictable and therefore workable for the different actors and their preferences influenced under it.

ii. Embedded Liberalism

The essential link expressed in embedded liberalism between trade and social purposes is also important in relation to regional organizations, prompted by the expectation that regional trade and collaboration will lead to increased economic and social development for member states. Similarly to international cooperation, there is a trade off when becoming a member of such a regional pact but long term economic and social benefits are aimed for, not least through the liberalisation of the internal markets. This has an impact on the provisions of copyright law within regional organizations, as member states do not only consider international agreements, but also a more detailed and thorough harmonisation for the benefit of lowering trade barriers on a regional level.

This sort of regional stability is more important now than for a long time, since the recent years of economic crisis have made it increasingly difficult for one nation or another to act as a hegemonic power on the international stage and protectionist measures of markets are likely to increase if regional and international organizations fail to continue to support the shared social and trade purposes they subscribed to. Regional organizations provide for legislative and institutional measures which seek to promote economic stability and also those that are aimed to ensure social protection[75]. Regional organizations are a particularly good example of combining trade liberalization among member states, while also employing some measures of protection from excessive outside influences on the market. This allows a freer flow of goods, services, knowledge and

[75] "Trade Globalization, Economic Performance, and Social Protection: Nineteenth-Century British Laissez-Faire and Post-World War II U.S. – Embedded Liberalism", Salvatore Pitruzzello, International Organization, 2004 – reprinted in "Embedding Global Markets – An Enduring Challenge" edited by John G. Ruggie, 2008

culture within its borders, while ensuring that essential social securities are supported. To achieve this sort of compromise and balance between different nations, economic priorities and social needs, regional organizations do not only rely on a stable cross-national legislative basis and institutional framework, but also require the collaboration and commitment of their member states' national legal structures and enforcement institutions.

Similarly to the considerations that have been expressed in relation the international legal framework, it is also within regional organizations that economic progress is highly interconnected with social developments and priorities[76]. The compromise inherent in embedded liberalism can potentially be resolved more efficiently in the context of regional collaboration than on an international level, since a common basis and aim are frequently the binding motivation between regional organizations' member countries[77]. The decreased number of countries which have to reach a consensus and which have comparable developmental needs in their social structure facilitates the formation, implementation and enforcement of supra-national legislation, while similarly also providing a potential to developing countries to have some sort of protection against international companies which might want to abuse their monopoly power in the international market[78]. Similarly to the international level, regional organizations have not only the responsibility to care for the economic needs of the market, without disregarding the importance of social stability and predictability of the legal system, applicable to all its member countries and their citizens. The Andean Community for example has made explicit provisions for some elementary exceptions which each member state has to incorporate into their national copyright framework, therefore it utilizes its position as a supra-national legislator and court to ensure the

[76] Above references for instance, "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", James Caporaso and Sidney Tarrow, November, 2007

[77] This can be seen in Ecuador's participation in the Andean Community, summarized in chapters 4 and 5

[78] See for instance the explanations provided in "The Death of the Trade Regime", Jeffrey L. Dunoff, 1999, page 10-11

harmonization of rights among its member states, which take into account both copyright industries and essential social priorities.

Another important issue has been raised in relation to the existence of embedded liberalism and the entering into a social compromise, namely, that some states are able to monopolize international governance and therefore shape international law as best suited to their particular interests[79]. A current problem faced by the international community is that the benefits of trade liberalization are mainly distributed unevenly[80]. One reason being that many developing countries do not have the independent resources and political power necessary to cushion the effects of globalization through national policy[81]. Another criticism along the same lines is that industrialized nations bring about domestic stability by transferring the adjustment costs of international trade to developing countries[82], for example through legal and economic measures designed to benefit national markets and simultaneously often placing an additional burden of requirements or limits on external states to enter into the common regional or national market. This appears at first sight to be more applicable to purely trade concerns, but at the base of any trade policy are the corresponding laws and regulations to implement it. In relation to the global knowledge industry, this criticism is particularly relevant and while regional organizations are more likely to take into consideration the individual issues faced by member states, they also often implement legislation which is more beneficial to some than to others.

The understanding that we live in a world with different legislative and constitutionalized systems, which resemble sometimes more of a heterarchy – and not just a hierarchy - is at the heart of grasping the complex interconnections that exist between international, regional and national implementation of TRIPS. Countries do no longer operate in isolation and their legislation as well as enforcement has to take into

[79] The Corporate Connection, John Gerard Ruggie, 2008

[80] This has been supported by authors like Nita Rudra

[81] "Globalization and the Decline of the Welfare State in Less-Developed Countries", Nita Rudra, 2002 - reprinted in "Embedding Global Markets – An Enduring Challenge" edited by John G. Ruggie, 2008

[82] "Reconstructing Embedding Liberalism", Andrew Lang

account the complexity of several distinct legal sources, all while trying to balance trade liberalization with national social objectives and priorities. While the analysis of the concept and the workings of certain forms of constitutionalization, embedded liberalism and proportionality at a global level is important, the implications these have for regional organizations and their member states is the main focus of this work.

Chapter Conclusions

As can be seen from the present chapter the essential principles of constitutionalization and embedded liberalism are vital for the analysis and understanding of the international copyright structures and the role that regional organizations play in their implementation and function. Constitutionalization is essential to understanding how the increased harmonization of cross border regulation influences the trade in goods and services, including copyright protected goods. Another important aspect of constitutionalization is, as previously mentioned, institutionalization because it ensures the creation of adequate processes and enforcement possibilities. This is also relevant in connection with Trachtman's analysis that regulatory jurisdictions are grounded upon state preferences and when transferring this understanding to a cross-national framework the need for such to strike balances and to some extent compromises between the different priorities becomes evident. A further important lesson to keep in mind from the explanations laid out in this chapter, is the understanding that international and regional organizations can have a greater aptitude to deal with issues arising out of inter-state legislative frameworks, in particular prescriptive jurisdiction, based on their potential to create legislation and delegate powers to national authorities when appropriate.

This system of inter-connected legal and organizational frameworks fits in well with the understanding of an increased need for rules and regulations, while also putting in place institutions to oversee and assign them on an international and regional level. The essential benefits derived from this collaboration include stability and predictability for the actors involved in different levels of the global market, without there always needing to be one single nation that acts as a hegemon. In addition, this principle can be highlighted in relation to Latin America and it becomes

clear that the benefits of increased harmonization and institutionalization within the Andean Community are not only based on the liberalisation of trade markets but also rely on the active influence of the states to regulate and safeguard certain interests based on the laws and regulations established.

Here there is a clear link onto embedded liberalism as an explanation of how social preferences and aims are incorporated into a legal and economic framework; this is an important tool not only for the improvement of the economic market and connections, but also for the benefit of social developments. This can be seen as representing Ruggie's essential link between trade and non-trade aspects in the international structure. Ruggie explains that some form of essential protectionism is acceptable with embedded liberalism but he also makes it clear that different analysis has shown that embedded liberalism has the potential to provide stable long term economics as well as social developments. While there are clearly some issues with the concept of embedded liberalism, its essential value for this study lies in its ability to highlight the need for legislation and the enforcing institutions to balance economic and social needs. The application of this concept, in combination with the concept of constitutionalization or proportionality, is able to provide a fuller picture of the international and regional structures, rather than seeing them as stand-alone principles. It is through combining them that the cross-national framework becomes more understandable and operational, as a complex world requires a complex and interconnected framework to understand it.

The concept of proportionality provides a vital connection between the applications of both constitutionalization and embedded liberalism. For the purposes of this study it serves as a concept which will be used for the practical application and functioning of these two concepts within the different regional and national legal systems examined. Proportionality is applied in relation to legislation and enforcement, by ensuring that the means are in proportion to the ends as well as providing a balance between different rights and preferences. As explained previously, Alexy made it clear that the principle of balance involves the consideration that the greater the detriment to one legal principle, the greater the need for the other to be satisfied. Therefore, constitutionalization in the establishment of legislation and institutions for this interpretation is essential for this

balancing of competing and, at times, conflicting rights, particularly in connection with the protection of copyright and the basic struggle that lies within it. The principle of balance is also essential to embedded liberalism as it ensures that economic preferences and rights are balanced with social priorities. Embedded liberalism incorporates the essential connection between trade liberalisation and economic development.

It has been remarked previously that the international trade framework does not amount to a constitution like institutional structure; however, the essential legislation established under the international umbrella is binding on the majority of countries in this world. Regional organizations have the possibility of taking these laws and applying and enforcing them in a more detailed cross-national manner and simultaneously taking into account the particular aims, needs and priorities of their member states. The principles of increased constitutionalization, embedded liberalism and proportionality demonstrate the manifold and interconnected workings at play in a world where international, regional and national legislative frameworks exist in a parallel and inter-connected fashion with each other.

The hypothesis that will be examined further is that regional organizations are able to provide a better balance between the economic and social needs of their member states, while also having institutions that make these regulations more enforceable than just under an international framework such as TRIPS. The essential questions which will be taken forward for the evaluation of the following chapters are; 1.) Is there any evidence of balance in the different legal copyright protection systems, using the concepts of constitutionalization, embedded liberalism and proportionality to examine them in relation to Ecuador, Chile and the UK? 2.) What, if any, is the role of regional organizations in establishing and supporting this balance, particularly in relation to the examples of the Andean Community and the European Union?

While constitutionalization and embedded liberalism will be utilized to examine the absence or presence of balance within the legislative provisions for copyright protection, proportionality will be employed in relation to court decisions and the balancing of rights and interests presented before them. The concept of constitutionalization highlights the

binding legal provisions to which actors are subject and these can either be geared towards one set of copyright interests or another. If and how this is part of international, regional or national legislation will be examined in this research. Embedded liberalism will be used in order to emphasise the parts of the framework in which economic and social considerations ought to be or are reflected in the structure. The practical application of the legal framework and the balancing of the distinct interests and needs that is inherent to copyright is mainly down to the institutions and courts that enforce the law and are therefore considered in terms of interpreting proportionality.

Chapter 3

International Institutions, TRIPS and TRIPS+

The focus of this chapter will be international institutions and copyright treaties which are at the heart of international cooperation and therefore have an effect on the national as well as regional approaches towards trade and in particular on the protection of intellectual property. It is important to understand the role and development of these institutions as they are the driving force behind international harmonization of laws and they lay out the ground rules in each of their member states. The initial consideration is placed on the development of an international trade system and on what basic principles this was formed. Following this, more recent developments will be explored in order to paint a picture of the objectives and reasons behind a harmonised multilateral system. Throughout, continued reference will be made to the specific participation and position of the UK, Chile and Ecuador within this international system, as the attitude that a nation has towards the international system influences how international legislation is used and understood. The aim of this chapter is to give an overview of and understand some of the global dynamics which influence the legislative decisions made in member countries. The chapter structure will examine each country's position in turn, first briefly in relation to GATT, then the WTO and WIPO and finally in connection to TRIPS.

GATT – the beginnings

The intention behind the agreement was the creation of economic stability through international collaboration and it was thought to be a tool which would avoid excessive tariffs and economic retaliation between countries, as these had been identified as the reasons for the economic tension which accumulated prior to the war[1]. The foundation of the GATT

[1] More information can be found for instance in "WTO/GATT – Chronology of achievements", WTO Press Brief, found at

system are four essential principles. The first one of these is that although member states are permitted to award protection to national products, they are required to do so only through tariffs and to keep such measures low The second principle provides for the reduction of existing tariffs and other trade barriers. The most-favoured-nation principle is also a pillar of the GATT agreement, it provides for non-discriminatory treatment between member states for the export and import of goods, but the most important exception to this rule are regional agreements. The last vital principle of this agreement is the national treatment rule, which prohibits countries from imposing internal taxes upon imported goods which are higher than those imposed on a comparable national product, once they have paid duties on entering the country[2].

Both Chile and the UK were founding members of GATT, although Chile has been criticised for lowering the trade barriers too soon and too extensively without waiting for reciprocal actions from industrial trade partners[3]. This might reflect an extensive eagerness to participate in the world economy which is still evident in its more recent approach to trade and TRIPS+ treaty negotiations[4]. The main leaders of GATT negotiations have been identified as being the US, Canada and the UK[5]. The pre- and post-war experience of the UK as a major European economy was no doubt an elementary motivation for its leading role in these negotiations and international developments. It has further been identified that the first five trade rounds under the GATT system up to 1961 were dominated by

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http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm last accessed 11/01/2015

[2] See for instance; “The Law and Policy of the World Trade Organization”, Peter Van den Bossche, 2011, Cambridge University Press - “Introduction to WTO Basic Principles and Rules”, WTO E-Learning,

[3] “Chile en el GATT que se busca”, Roberto Pizarro, full article can be found on http://pizroberto.blogspot.co.uk/2010/11/chile-en-el-gatt-que-se-busca.html, last accessed 06/04/2014

[4] This will be examined in greater detail in the later section of this Chapter in relation to TRIPS as well as in Chapter 7 which is dedicated entirely to Chiles position

[5] "Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement", Chad P. Brown, 2009

major exporting countries or those who had a particular interest of supply in a specific area[6].

Ecuador, however, did not accede to GATT or the WTO until 1996, when it was the first country to do so. Strong opinions were expressed by Ecuador which reflect its understanding of international cooperation that should benefit developed and developing countries and its reservations about the achievement of this during GATT negotiations. This is reflected in one of the speeches that was given by its delegates. He stated that Ecuador "had the hope that the Charter we were to draft would satisfy both the great industrial powers and the under-developed countries...we have before us the result of four months incessant discussions and struggles, sometimes hidden, to impose a principle. The spirit of compromise also appears in the new text. But can we say that this spirit has fully shown the wide understanding deserved by the needs of those countries which are only on the threshold of their economic development?"[7] Similar worries are often identified by developing countries in relation not just to GATT and the WTO in general but also particularly in the context of TRIPS[8].

WTO – institutional and legal evolution

- ***Essential Principles***

Essentially the WTO was formed to provide a safe environment for the negotiation of agreements which have the common objective of the GATT to reduce barriers to international trade. Some important agreements which countries have to assign as WTO Members are GATT, GATS, TRIMs and TRIPS. These agreements contain much of the guiding principles of

[6] same as above reference number 3

[7] United Nation Conference on Trade and Employments, Speech Delivered by the Head of the Delegation of Ecuador, Mr. Chiriboca. Havana, Cuba, 23 March 1948

[8] See for instance “Intellectual Property, Biogenetic Resources & Traditional Knowledge”, Graham Dutfield, “Intellectual Property, Biogenetic Resources & Traditional Knowledge”, Graham Dutfield, 2004, Earthscan and “The Push for Stronger Enforcement Rules: Implications for Developing Countries”, Carlos Correa, 2008, International Centre for Trade and Sustainable Development (ICTSD), .which talk about developing countries challenges in relation to a variety of issues such as completion policy, traditional knowledge and biodiversity.

trade liberalization and set out the boundaries of applicable exceptions. It should not be forgotten that these agreements are by no means set in stone; they can be adapted and re-negotiated when it is perceived as necessary and new agreements can be agreed upon which will then also form part of the legislative basis. This is an important element of international constitutionalization and the fact that international legal foundations can change over time.

In addition, the WTO provides a unified legal and institutional framework in order to ensure the correct implementation of the related agreements through mechanisms such as dispute settlement and the monitoring of the national implementation of these agreements. The importance of the institutional aspect of it lies in its aim to push for the reduction of trade barriers through negotiation and establishment of international rules, the continued monitoring and administrative responsibilities arising in relation to these trade rules, the keeping track of sufficient transparency of bilateral and regional trade agreements as well as the periodic review of trade policies in the member states. Further, the WTO is also the organisation which settles disputes between member states with reference to the agreements[9]. These aspects are important for international institutionalization because they highlight not only the role of establishing a legal framework but also the importance of administrative control and enforceability.

The essential reasoning behind the WTO's aims and actions could be summarized as; that through the increased abolition of trade barriers, national markets are opened to international trade which will cause sustainable development and economic stability, while consideration must be given to necessary flexibilities and exceptions. The WTO further believes that the smooth flow of trade between nations and access to a trade disputes resolution system are contributors to the peace among countries[10], while these objectives can be understood as indications of

[9] The tools which are used to give this support to developing country members are for instance the Aid for Trade program, the courses for government official which are held in Geneva as well as the technical cooperation projects which are carried out each year.

[10] These objectives are reflected in the preamble of many agreements such as the GATT, and TRIPS

great cooperation, understanding and confidence on an international level, this shows that there are not only economic reasons for collaboration between nations and the establishment and evolution of an international legal and institutional framework. This can also be seen in the increased importance of international institutions for the safeguarding and enforcement of economic and connected social rights, in terms of supporting the increased spread of welfare of member states[11]. Although the restriction of imports might seem like a good idea at a certain point in time in order to support a specific sector, increased prices in one sector put pressure on the wages of all the workforce and therefore on other sectors of the economy. In connection with the principles explained under embedded liberalism, this example shows that there is an integrated relationship between economic collaboration and social stability as well as development, and this in turn is tightly connected to the balance of different interests.

The requirement for participating countries to notify the WTO of their policies[12], legislation and measures which have been implemented is also established under the main agreements, once again this illustrates the overseeing function of the WTO. However, the principal sovereignty of the member states remains intact although they have to abide by the supra-national law; they are free to implement treaties in the manner they deem most suitable for their own economic and social preferences, if they do so within the established treaty limits and without infringing another country's rights. One author has argued in this context that embedded liberalism might no longer be entirely relevant in the WTO system, there is continued importance in the WTO Agreement to "carefully balance Members' commitment to free trade with their other non-trade interests"[13] and

[11] Dunoff and Trachtman also recognize this increased need in "A functional Approach to International Constitutionalization", 2009…..

[12] This requirement has already been part of GATT since the 1940's, under Articles 16 to19 and has been extended further, and the Tokyo Round requiring members to do so to the maximum extend that is possible for them.

[13] "The Rise of National Regulatory Autonomy in the GATT/WTO Regime", Michael Ming Du, Journal of International Economic Law (2011) 14 (3): 639, 1 September 2011

therefore still remains the essential consideration of implementing the treaties in such a way as to balance importance equally between them.

- ***UK in the WTO***

Some indication of the relationship between the WTO and its member states can be seen in how the UK (as part of the European Union) is subject to regular reviews in relation to its economic and trade policy by the WTO[14]. The same applies for all member states and these reviews are an important and interesting source for understanding the role it plays in international cooperation and sometimes on what are the underlying trade policies and intention of a country.

In order to appreciate the relevance of the UK in the international arena, it has to be appreciated that the UK is one of the founding members of the WTO and it has an important role within the EU. The combined exports of the UK, France and Italy account for about a third of all EU exports of products with a high individual unit value, while another third of these exports is accounted for by Germany alone. The UK's main trading partner in 2009 was the US and there was a decline in trade as the financial crises took full effect between 2008 and 2009, the same is true, on average, for the other US trade partners in Europe (Belgium, France, Ireland and Italy).

Another important economic factor is the trade of services and in this sector the UK is the EU's largest exporter, since it carries out about 21% of all of these EU exports. In relation to imports, it is ranked second highest, followed by France and preceded by Germany. These aspects combined, lead to the UK having the largest balance surplus within the EU. Yet, the EU as a whole is also a very strong international trade partner[15], in relation to foreign direct investment, for example, the EU counts as the largest recipient and simultaneously the largest supplier in the world[16]. The

[14] See for example the Press release for the Trade Policy Review, European Union, Positive economic performance but continued reforms needed, 2009

[15] The EU has concluded many trade agreements across the globe and most recently with Korea while also conducting negotiations to such effect with Colombia and Peru while seeking a further agreement with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

[16] Trade Policy Review, EU, Report by the Secretariat, 2011, Section I Economic Environment

EU's decision to maintain open and transparent trade and investment in a situation of crises and protectionist pressures has strengthened and stabilized the multilateral trade system, which can be linked back to the EU's leadership role as the world's largest trader.[17] In this context, the concept of embedded liberalism can provide a great example of how economic protectionism not only has a direct effect on economic development but also has a secondary effect on social stability. This is vital when considering the potential long term effects arising from a protectionist strategy and also emphasises the need for legal frameworks and institutions to safeguard a balance between economic and social objectives.

- ***Chile in the WTO***

Chile's role as a founding Member of the WTO and its approach to international trade has been highlighted in the most recent Trade Policy Review, where its active role during the negotiations and positive conclusion of the Doha Development Agenda are also remarked upon[18]. Chile is a strong supporter of the multilateral trading system and especially the WTO which it considers to be "the only forum available to resolve some of the outstanding problems on the global trade agenda"[19]. In relation to IP, the aim underlying the presented reforms to the national system was declared as the further strengthening and adapting it in relation to international commitments entered into by Chile[20]. This illustrates that some of the Chilean provisions go beyond the established requirements in TRIPS, particularly in relation to copyright and industrial property[21].

Bilateral Trade Agreements are the centre stage of its international trade policy. In 2009, it was a party to 21 treaties with 57 different trading

[17] Trade Policy Review, EU, 2011, Summary, paragraph 1

[18] Trade Policy Review; Chile, Report by the Secretariat, 2009, Section II Trade and Foreign Investment Regime

[19] Trade Policy Review; Chile, Report by the Secretariat, 2009, Section II Trade and Foreign Investment Regime, paragraph 2

[20] Trade Policy Review; Chile, Report by the Secretariat, 2009, Summary, paragraph 20

[21] Trade Policy Review; Chile, Report by the Secretariat, 2009, Summary, paragraph 21

partners. This has resulted in 92% of Chile's total commodity trade taking place with preferential partners, the resulting concerns are in the Secretariat's opinion "allayed" due to the state's strong backing of the multilateral trading system[22]. This statement is somewhat surprising since one of the basic principles of the GATT/WTO system is non-discrimination and uniformity of treatment across all member countries. It is true that regional integration and trade agreements are an exception to this rule, but the excessive use of an exception should nevertheless be examined and not considered as unimportant due to the supportive opinion of the member country in question. What if a country which is not explicitly a fan of the multilateral trading system employed such a policy, would it then be a reason for concern?

- ***Ecuador in the WTO***

Ecuador acceded to the WTO in 1996 as the first new member after its creation. During its application process, Ecuador stated that in the last few years prior to its application it can be seen that it has conducted indiscriminate trade in order to integrate itself into international economic mechanisms, with the aim "to modernize its production structure, reconvert its industry and profit from its comparative advantages"[23]. The areas of concern most member states questioned in relation to TRIPS and Ecuador's intellectual property protection, were the protection of pharmaceutical products, microorganisms and plant species and software, in relation to which the particular concern lay with whether piracy in this area can be prevented and prosecuted effectively. In response to whether the country' national provisions are consistent with TRIPS, the Ecuadorian representative made reference to the primary legal text[24], whose amended version makes explicit provisions for the case of piracy, distribution and sale of illegal copies. Further relevance can be seen in the provisions agreed to by Ecuador in relation to its membership in the Andean

[22] Trade Policy Review; Chile, Report by the Secretariat, 2009, Summary, paragraph 8

[23] Report of the Working Party on the Accession of Ecuador, WTO, 14 July 1995, paragraph 4

[24] The Copyright Law, enacted by Supreme Decree No. 610 and published in the Official Journal, No. 0149 of 13 August 1976 , amended by the Supreme Decree No. 2821 in Official Journal No. 0735 of 20 December 1978

Community, specifically Decision 351, which established common regulations for the protection of copyright and neighbouring rights. The representative therefore reassured member states of the implementation and application of the TRIPS requirements in Ecuador[25]. It should be noted that reference was made more explicitly as to the conformity with Andean Community provisions rather than national ones, which may be an indication of the relevance they have for Ecuador's protection framework. .

In the ensuing years, the Ecuadorian accession commitments have been assessed by the WTO. In 1997, it was made clear that Ecuador had taken its commitments very seriously and reference was made to the difficulties it experienced in carrying through the changes due to 1996 being an election year. As a benefit of the joint work in technical cooperation, the concluding comment of this report reflected Ecuador's confidence that it will not need to take advantage of the rights granted to it as a developing country in order to fulfil the agreed commitments[26]. In a meeting with the WTO Council for TRIPS[27] Ecuador's legislation for the protection of intellectual property rights was examined and finalized and, therefore, the list of fulfilled accession commitments should be extended to those relating to intellectual property protection.

Ecuador's approach to international trade has changed considerably in the time period between 2005 and 2011. Constitutional and institutional changes have had a considerable impact on its economic and social development policy and, in particular, the contribution of trade and foreign direct investment to such development. These amendments made provisions for greater state participation and control in areas of strategic importance combined with an "inward-looking trade regime", while also employing tariff and non-tariff measures for selective import substitutions, support of domestic production, promotion of exports and assistance through tax and non-tax incentives.

[25] Report of the Working Party on the Accession of Ecuador, WTO, 14 July 1995, paragraphs 77 and 78

[26] Ecuador: WTO Accession Commitments, Report by Ecuador , 20. February.1997

[27] Ecuador: WTO Accession Commitments , Report by Ecuador, 24 January 2000

On the other hand, Ecuador recognises the increased security and predictability given by multilateral trade regulations and has used the WTO Dispute Settlement system to protect its trade interests. Its focus in relation to regional cooperation has shifted from economic aspects to mainly social and political interests. The declared trade aims of the 2008 Constitution are the strengthening of the domestic market (in reference to the National Development Plan), to "regulate and promote the country's integration into the global economy; boost domestic production; contribute to ensuring food and energy sovereignty, and reduce internal disparities; promote the development of economies of scale and fair trade; and prevent monopoly and oligopoly practices, particularly those of the private sector, and others that distort the functioning of the market"[28]. As can be seen from the previous statements, the aims of a liberal trade strategy are not only economic in nature but also social benefits. National legislators as well as institutions need to redistribute some of the negative effects that can result from trade liberalisation, this is an important redistributive function of governments[29].

Ecuador's attitude towards the WTO can be seen in its call for a newly defined system of governance and reform in order to respond to global challenges. In its opinion, this is necessary for the WTO in order to continue its guiding role for the establishment of fair and equitable trade rules "that will reduce the widening gaps in welfare and technology between the South and the North"[30]. In the introduction to the report, the Secretary stated that "it remains to be seen whether Ecuador's unorthodox policies, such as state intervention and selective import substitution, together with regional trade liberalization are the most effective means to accomplish its economic and social objectives. A stable, predictable and transparent trade and trade-related legal and institutional framework could be the key to

[28] Trade Policy Review; Ecuador, Report by Secretariat, 2011, Section PII Trade and Foreign Investment Regime, paragraph 19

[29] Please refer to the theoretic framework and the specific reference to “Constitutional Economics of the World Trade Organization”, Joel P. Trachtman, published in: Ruling the World – Constitutionalism, International Law, and Global Governance, 2009

[30] Trade Policy Review; Ecuador, Report by Secretariat, 2011, Section PII Trade and Foreign Investment Regime, paragraph 27

success"[31]. This recognition of the international system is vital to the functioning of it, since national authorities and legislation are required to implement international law and respect the authority that international institutions, such as the WTO, have in decision making. What can be seen by Ecuador's story with the WTO is not only an example of how its regional participation aided its entrance into this international organisation but also how it prepared and stabilized the national copyright framework prior and during this process.

WIPO – IP organisation

The World Intellectual Property Organization is a United Nations agency which dedicates itself to the issues relating to intellectual property and its contribution towards stimulating innovation and creativity[32]. WIPO aims to obtain and include the balanced evolution of a normative IP framework and the promotion of IP for development. These goals reflect the importance which is granted to access to knowledge as well as simultaneously recognizing the potential for public benefit. This also represent the two sides of the copyright coin, which have to be combined in such a way as to gain an equilibrium between the different interests and needs that countries face. Over 90% of the countries of the world are WIPO Member states[33].

- ***The UK in WIPO***

The UK signed the WIPO Convention in 1967 and has since been a signatory to all the major international Agreements and Conventions which are concerned with the protection of intellectual property. It joined the, now WIPO-administered treaties, Berne Convention in 1886 and the Paris Convention in 1884. The Berne Convention requires, among other provisions, that its signatory countries recognise the copyright of authors

[31] Trade Policy Review; Ecuador, Report by Secretariat, 2011, Summary, Paragraph 21

[32] For more detailed information see for example the Manual of the Delivery of WIPO Technical Assistance that can be found on the WIPO website,www.wto.org, last accessed 17/04/2015

[33] WIPO currently counts 185 member countries, a full list of which can be found at http://www.wipo.int/members/en/

from other signatory countries in the same manner as it recognizes the rights of its national authors[34]. The Paris Convention applies to industrial property and establishes considerable terms for the national treatment, priority rights and common rules of IP protection[35].The UK's early accession to these treaties clearly identifies its long history and consideration of international collaboration in relation to IP matters. A recent example of this close collaboration can be seen in the agreement formed between the UK Intellectual Property Office (IPO) and WIPO which has the objective of further developing understanding of intellectual property and related systems, with particular attention given to the promotion of this in developing countries[36]. This highlights the importance of an institutional dimension for the promotion of social objectives as well as economic growth since legislation requires institutions to safeguard and enforce it; this is a principle vital to the concept of international and regional constitutionalization in the form of institutionalization.

- ***Chile in WIPO***

Chile became a member of the WIPO Convention in 1975 and joined the Berne Convention in 1970 but there was a considerable gap until it assigned to the Paris Convention in 1991. Similar to the UK, it has since been cooperating closely with WIPO on a variety of issues. Particular interest and involvement was indicated in the areas of protecting genetic resources and traditional knowledge, through requesting that additional treaties should be formed in their benefit. Chile has made considerable efforts, especially in the resource allocation for the entire remodelling of the technological platforms in collaboration with WIPO and its plan to completely reform its industrial property system[37]. This highlights the

[34] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886

[35] The Paris Convention for the Protection of Industrial Property, 20 March 1883

[36] The IPO plays an important role in the management of these rights in order to promote innovation and creativity, as well as balancing the requirements of consumers and right holders. UK and the World Intellectual Property Office (WIPO) agree to enhance co-operation for development, 2 October 2012, http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20121002.htm

[37] General Statement of Chile to the WIPO General Assembly 2012, www.keionline.org/node/1560

continued concern for improvement and the cooperation it attributes to this international IP institution.

- ***Ecuador in WIPO***

Ecuador joined the WIPO Convention in 1967, which is surprising to some extent since it just acceded relatively recently to the Paris and Berne Convention as well as to other IP Conventions between 1991 and 2001. Since then, there have been many seminars and meetings headed by WIPO, which aimed to assist the understanding and utilization of IP legislation, jurisdiction and implementation in Ecuador. An important example of Ecuador's participation in the WIPO system is its joint proposal with Brazil and Paraguay on the formation of new treaty exceptions for the benefit of visually impaired persons to help them access reading material, which was considered a legitimate and urgent demand of civil society. The national director of copyright in Ecuador stated that this is an important step towards valuing the human rights of the citizens as much as the private interests of the rights holders, further he made clear that "WIPO has just taken a first step towards assessing the intellectual property system as a tool for development, and contribution to improving the living standards of all people, not just of rights holders"[38].

These rather strong statements might be interpreted as representing the point of view that the protection of the rights holder's interest might cause detriment to the rest of society, unless there are sufficient limitations and exceptions to balance the situation. This is an essential consideration in terms of highlighting the central conflict of copyright protection between the interests of rights holders and those of society at large, particularly in terms of requiring access to knowledge and culture. Therefore, legislation and institutions have to take into account the social developments that need to be embedded into economic growth, in order to establish a balanced legal system that redistributes benefits evenly. Another situation which clearly demonstrates that Ecuador is actively participating on the international stage, and that it is by no means afraid to make its voice heard in order to promote social considerations of

[38] "Avanza propuesta de tratado de la OMPI sobre limitaciones y excepciones a los derechos de autor", William New, www.aporrea.org, published 05.06.2009, last accessed 18.10.2012

copyright and access to knowledge, is the joint work of Ecuador and WIPO and their agreement for the creation of Support Centres for Technology and Innovation (CATI) in Universities. These provide free or low cost access to information technology and scientific journals under the administration of WIPO[39].

TRIPS provisions – harmonizing copyright

- ***Background***

The principle agreement for Intellectual Property protection, including copyright, on an international level is the TRIPS Agreement, which followed and combined provisions of the Paris, Berne, Rome and Semiconductor Chip Conventions under the heading of the GATT and its principles of national treatment and most favoured nation treatment. The main provisions for copyright protection awarded under this system include the obligation to comply with the provisions of the Berne Convention. Each member also has the liberty to establish their own system for the application of IP provisions, without disregarding the most favoured nation principle and other national treatment provisions. This has to the effect that the use of the legislative provision in theory should be uniformly applied to all the member states without causing particular benefits or detriment to one or the other. One of the main objectives of TRIPS is to balance the rights of the rights holder with the interests and benefits that a competitive and knowledge sharing market provides to society[40]. Therefore, TRIPS recognises the value in having a framework for protection that takes into account more than simple economic gains.

However, the provisions for limitations that can be utilized to promote such a balance between economic and social interests should be confined to "certain special cases which do not conflict with normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the rights holder[41]". No particular exceptions and limitations

[39] La OMPI y el IEPI lanzan “Centros de Red de Apoyo a la Tecnología y a la Innovación en el Ecuador”, 21 de julio de 2010

[40] For instance this can be seen in the preamble and Articles 7/8 TRIPS

[41] Berne three-step test, incorporated in TRIPS Article 13

have to be incorporated[42] into national legislation, so the extent to which a redistribution and balance is available, depends on the particular attitude of every member state. This is evidently a clear failing in the often praised harmonisation and predictability function of TRIPS since how can an agreement seek to provide a uniform and predictable basis for trade when it disregards the importance of social considerations that are linked to such trade?

The fundamental importance of access to knowledge for example, in connection with the balance of copyrights, has been highlighted by Professor Correa who stated that "there is a need to control the provision of at least some of the social benefits... If such technologies are incorporated within the technical standards without any limitations, the occurrence of unfair competition will be inevitable"[43]. A balanced framework would require not only the protections to be harmonized, but also the harmonization since this would ensure an enforcement and application taking into consideration the diverse interests at play. As explained in embedded liberalism, legal frameworks are used not only to protect economic interests, but to also embed social priorities into them, clearly exceptions for legitimate needs and uses are important social standards and therefore should also be harmonized in the international setting.

- ***Moral and Economic Rights in the Berne Convention and incorporated in TRIPS***

Part II of TRIPS[44] provides rules for the availability, scope and application of IP rights. Section 1 of this part concerns copyright and related rights. It incorporates the regulations from the Berne Convention and reinforces the principle that copyright protection only applies to the expression and not to the idea itself. This is essential in terms of adaptation, reliance on previous knowledge and employing different modes

[42] "Developing Countries in the WTO legal System", J. Trachtman, 2009, page 122

[43] "How Developing Countries Can Manage Intellectual Property Rights To Maximize Access to Knowledge", Xuan Li and Carlos Correa, February 2009

[44] Agreement on Trade Related Aspects of Intellectual Property Rights, full version available at; swww.wto.org/english/docs_e/legal_e/27-trips.pdf

of expression, therefore supporting a variety of artistic, educational and cultural works.

The main provisions for the protection of core copyright protections under the Berne Convention and incorporated in TRIPS begin in *Article 2* in which a definition is provided for what is to be understood as literary and artistic work as well as establishing the basic protections for related works, such as translations or adaptations. *Article 3* lays down the criteria for protection, while also considering the situation of published and simultaneously published works. A further vital part of this legislation is contained in *Article 5*, as this section sets out the rights that the author can enjoy in respect of the protected work. *Article 7* establishes the term of protection for the work, as being the author's life plus 50 years after his death. The rights of reproduction are contained in *Article 9* and *Article 11*, which take a look at special provisions for music and dramatic works. Cinematographic and related works are considered in *Article 14* of the Berne Convention, while *Article 15* provides the author with possibilities to enforce the rights granted under this Convention. The fact that this Convention sets out to provide something of a minimal standard of protection can be seen from the statements contained in *Article 19*, where it is made clear that member states are free to establish protections greater than those set out in the Berne Convention and also that special regulations can be made concerning developing countries[45]. These are provisions which are elementary and provide the basis for the establishment of other rights and enforcement procedures on which creators can rely in every member state of the WTO and therefore TRIPS.

This benefit of predictable rights does not necessarily extend to moral rights since *Article 6bis* of the Berne Convention[46] confers these upon the author. However, it is stated explicitly in TRIPS that this Article is not automatically transferred to the Member States. Yet the value of moral rights protection should not be underestimated as they contribute to the establishment and protection of social rights within an economic rights protection. An example of this is the moral right of an author to object to a

[45] Article 21 of the Berne Convention

[46] Full text of the Berne Convention can be found at http://www.wipo.int/treaties/en/ip/berne/

change in his work, thus not only protecting his integrity, but also conserving its intended nature for the public and future generations.

The rights established under TRIPS itself can be seen in *Article 10* which takes a look at the issue of the protection conferred upon computer programs and compilations of data. Rental rights are considered in *Article 11* of the agreement, particular focus is also paid to computer programs and cinematographic works in order to give the authors the right to authorize or prohibit the rental of their works. The terms of protection are discussed in *Article 12;* here it is set out that the term should not be less than 50 years if calculated based on the life of a natural person, from the making of the work or from the calendar year in which the work was created. Explicit exceptions from this rule are photographic works or a work of applied art.

The last major Article of this section concerns the protection of the performers and Producers of Sound Recordings and Broadcasters and this is *Article 14* of TRIPS. Paragraph 1 of this article provides for limitations on the fixation of sound recordings. Paragraph 2 on the other hand confers the right upon producers to "authorize or prohibit the direct or indirect reproduction of their phonograms". The fixation, reproduction, rebroadcasting and communication to the public can be prohibited by the broadcasting organizations under paragraph 3. The term of protection for this kind of work is provided under paragraph 5 to a minimum of 50 years calculated from the end of the calendar year in which the performances or the fixation was made; when protection is granted under paragraph 3, then a minimum of 20 years for a broadcast is given.

What these comprehensive provisions show is an extensive consideration of the ways in which protection can best be awarded to the different sets of rights holders. Attention is paid to detailed provision and specific consideration is placed on a variety of cases, such as specific terms for related works and simultaneously published ones. In addition, it ought to be remembered that every country can still make provisions which are much more extensive then these and while there is an aim to harmonize a set of minimum legislative rules, no provisions are made to limit the excessive exploitation of these. The international framework places considerable weight on the creators and creative industries' interests for the

protection of copyright and this is irrespective of much of the differences in understanding and approach towards protecting creations from one country to the next. While it is a core benefit of harmonization to provide for a common framework of protection, room must be left for particular needs and preferences. Developing countries are mentioned and considered marginally; however, little effort is made to explicitly include their point of view as a basis for harmonized provisions. The combined application of constitutionalization and embedded liberalism in this context highlights that the international level incorporates only limited concerns for social affairs into trade issues and yet establishes this as a binding treaty for all to abide by. The limited provisions that are thought to counterbalance those granted to creators are contained in Article 13 of TRIPS.

- ***Exceptions and Limitations***

By comparison, a very limited effort has been made for the provision of essential possibilities for balance. These are contained in *Articles 10 and 10bis* of the Berne Convention, since they lay out the options for free use of copyright protected works; these include illustrations for teaching, quotations and newspaper articles. *Article 13* also provides for further possible limitations which can be provided by each member state independently in regards to musical recordings and associated works. It should be remarked that these are possibilities which a state can incorporate but they are not under an expressed obligation to do so, therefore their existence or absence hinges on the values and priorities attached by the state to the IP protection framework and the social interests this particular states seeks to advance. The only provisions for limitations and exceptions for copyright protection under TRIPS are set out in *Article 13*, where it is established that members are free to set limitations and exceptions to the exclusive rights confined upon the author, provided this is done in extraordinary cases which do not conflict with the normal exploitation of the work or the interests of the rights holder[47].

The rather one-sided nature of the TRIPS Agreement itself is apparent from this unbalanced form of legal provisions. While there is a multitude of articles which establish the ins and outs of protections which

[47] Member states are free to also provide exceptions and limitations in respect to neighbouring right under Article 14, Section 5

have to be granted by every member state, the obligation to provide for any sort of counter balance is completely left up to the individual countries. This might, on the one hand, appear to be fair, as it allows member states freedoms in their incorporation and application of TRIPS, but, on the other hand, it is difficult to deduce what sort of balanced system ought to be effective across nations if essential and legitimate uses and exceptions are not harmonized. A system could only be considered balanced once it not only considers economic rights and liberalization but also incorporates essential social principles, while constitutionalization and institutionalization[48] are essential to balance these rights and priorities in accordance with circumstances and needs.

- ***Enforcement***

In relation to procedural and enforcement issues, this agreement provides that member countries shall make regulations for the possibility to order the production of evidence by a judicial tribunal. In the provision of available remedies, it is made clear that the judicial authorities must have the possibility and authority to take swift action in order to prevent infringement or for the maintenance of evidence. This taking of action is possible even without providing the alleged infringer with the possibility to be heard prior to taking these steps under the condition that he is then able to challenge any remedy ordered at the earliest point possible. These remedies include the rights holder being under an obligation "…order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement…"[49]. In relation to damages, this agreement provides that these should be given for an infringement of the rights protected and in its amount it should be able to sufficiently compensate the occurred injury. Apart from these civil procedures available to the rights holder, there must also be provisions for criminal procedures and penalties for at least commercial scale copyright piracy. Further provisions in relation to copyright piracy are required by member countries in order to intercept counterfeit goods from crossing national and international boundaries.

[48] Please refer to the theoretical framework for a more detailed explanation of these principles.

[49] Article 45 of Part III of TRIPS which contains the enforcement provisions

What is demonstrated through these specific requirements of enforcement in national law, is that TRIPS relies heavily on member states to safeguard and protect the standards established under it. The legal and institutional connection that exists between copyright protection on an international, regional and national level is essential to understanding the possibility of balance within this system. Since member countries are able to decide on the manner of implementing TRIPS provisions, the role that regional or bilateral treaties play in guiding such implementation has a direct effect on the establishment and enforcement of copyright. Due to the power that these treaties have in shaping a country's legislation and enforcement of copyright, particular focus will now be drawn to the situation of Chile and a selection of its bilateral agreements that incorporate provisions which go beyond the minimal standard provided by TRIPS (hereafter called TRIPS+ provisions).

TRIPS + Provisions and Chile

The issue of implementing different obligations can be seen especially in consideration of copyright protection within the different bilateral trade agreements that Chile has entered into. These establish varying degrees of Intellectual Property regulations, making the obligations placed upon Chile's national legal system for the protection of these rights rather complex. Since Chile is party to a considerable number of bilateral trade agreements, focus will be placed here on a few illustrative provisions contained in such treaties. The majority of trade agreements entered into by Chile combine aspects of reinforcing previous commitments under TRIPS, establishing provisions that go beyond it and creating a basis for future collaboration between the trade partners. But there are also some agreements which only make very scarce reference to IP, for example the agreement with Mexico only includes reference to the implementation and respect of provisions established in the Berne and Paris Convention and only requires the general term of IP protection to be the author's lifetime plus 50 years, while many of the other agreements ask for a lifetime plus 70 years. A summary of some of the agreements Chile has entered into in the pursuit of international trade and the obligations it entered into in relation to copyright protection is the next part of this chapter.

Bilateral Agreement with USA

A treaty which contains extensive provisions on different areas of IP protection, such as copyright and patent regulations, is the trade agreement between the USA and Chile[50]. Some of the reasons for establishing increased collaboration and protection in this area refer to the desire to "build on the foundation established in international treaties in the field of intellectual property"[51] including the TRIPS Agreement. It was also thought that the increased protection would benefit the promotion of technological innovation and transfer and this in turn was reasoned to be advantageous to producers as well as users in both countries and that this helps social and economic development. It was made clear that none of the provisions contained in this agreement shall derogate the right and obligations entered into by the parties under TRIPS or other multilateral IP treaties. Another important provision established under this treaty is the national treatment regulations which states that the parties should not treat persons of the other party less favourably than its own people. There is also a definition of the scope provided by the term "protection". Provisions are also contained for the development and implementation of protection in relation to education and outreach projects as measures for research and innovation as well as on the coordination of training, specialization and information exchange between the parties' institutions.

- ***Entrepreneurial Rights Protection awarded under the US treaty***

Specific provisions for copyright are contained in Article 17.5 of the treaty. This part starts off by making it clear that each party should have a framework in place which allows authors of literary and artistic works to authorize or prohibit any reproduction of their work, without regard to the form or timely character (permanent or temporary) of such a copy. Reference is also made to the Berne Convention and the need to enable authors to authorize or prohibit the public communication of their works. On

[50] Full text can be found at: www.sice.oas.org/TPD/CHL_USA/CHL_USA_e.asp

[51] Chapter 1, Article 1.2 of the Free Trade Agreement between USA and Chile

the other hand, authors shall have the right to make their works available to the public by way of transfer or sale of their ownership. An important provision is that the protection of a work (including photographs) shall last the life time of a natural person (but no less than the life of the author) and an additional 70 years.

Connected rights are considered in Article 17.6 of the treaty, at the onset it is made clear that "author" refers in this context also to those who have acquired these rights. Each party should take steps to make sure that performers and producers of phonographs can authorize or prohibit the reproduction of their works in any form, which expressly includes the temporary storage of these in electronic form as well as providing possibilities for them to authorize or prohibit the making available to the public of their works through sale or transfer of ownership. In addition, provisions should be made for the public communication of performances through wired or wireless means. Article 17.7 in turn focuses on common protections for copyright and related rights, it establishes that, where necessary, authorization has to be obtained from both the author and the performer or producer who own the rights to the phonogram. In addition, the person who obtained these rights, including through employment, may exercise these rights and enjoy the resulting benefits.

- ***Exceptions and Limitations awarded under the US treaty***

The next subsection revolves around the exceptions and limitations which should be granted in circumstances which do not conflict with the normal use of the work and do not cause unreasonable prejudice to the rights holder. Article 17.7 also makes provisions that the exceptions and limitations ought to be extended towards the digital environment, while also allowing parties to make new exceptions and limitations in this context when appropriate. Specifically these exceptions may include the transient or incidental reproduction with the purpose of enabling either the lawful transmission in a network or the lawful use of a work or subject matter.

One important and specific exception in this article states that the non-profit use of works in relation to libraries, archives and educational institutes may be exempt from criminal responsibility. An exemption from liability may also apply when the acts were made in good faith and without

the knowledge that they were prohibited. A list of possible exceptions in relation to computer programs is also included, such as the adaptation of a program for the protection of minors or achieving compatibility. However, once again, it is reinforced that these exceptions ought not to impair the rights and remedies for adequate legal protection, but instead the circumstances for the application have to be confined to special cases. It was made clear that this should be done by establishing a judicial system which focuses on the protection of intellectual property law and the distribution of resources for such an enforcement.

It is important to remark that the emphasis on strong protection and enforcement is an integral part of this agreement, this clearly indicates the priority of the parties to reinforce economic rights and, while exceptions are mentioned, they are clearly limited and a real balance cannot be found. While there are possible exceptions available, both parties to the agreement are free to either implement them or not, as they deem fit. This causes considerable issues since obligations are firmly imposed upon the legal system to protect the interests of the creator, yet no explicit balancing rights are guaranteed in either legal system. Therefore, there is a considerable lack of predictability for the copyright users as to what extent their needs are taken into consideration. The absence of balancing provisions that incorporate a social concern into this economic sphere illustrates an unequal distribution of importance for the competing interests in copyright. National preferences are once again determining if and in what way any legislative provisions are made for the counteracting of purely economic concerns. .

- ***Limited liability for service providers awarded under the US treaty***

The section which establishes provisions for the limitation of liability of internet service providers has promoted a significant change in the national legislation. These provisions start off by requiring that each party shall give legal incentives for service providers to cooperate with copyright holders in order to combat unauthorized storage and transmission of protected works. The national law should also be limited to the extent of remedies which can be brought against service providers for copyright infringements which have not been initiated, controlled or directed by them.

These limitations were further clarified as precluding monetary relief and to restrict injunctions for a specified and restricted number of functions. These limitations are set to only apply when the provider does not initiate the transmission or selects the material or recipients of them.

The next section related to these provisions makes it clear that the application of these limitations is connected to certain conditions on the provider. But, no condition is imposed on the provider to monitor its service or to look for circumstances indicating infringement, except within the scope of technical measures. In addition to limiting the reasons for a claim against the provider, further regulations are made to limit the remedies against them. This can be interpreted as a section of the treaty which illustrates the concern of the US to establish exactly those provisions in bilateral agreements which are beneficial for their own interests, but it remains questionable to what extent, if any, they are actual beneficial to Chilean interests. This bilateral treaty contains extensive provisions for the benefit of rights holders and creative industries, which are now also reflected in Chilean national law. While some of these were already established principles prior to the agreement, due to national development of legislation or obligations under TRIPS and other Treaties, some reforms can be traced back to the provisions contained in this agreement[52].

Chile and its Bilateral Treaty with China

Extensive provisions for the protection of copyright can also be found in the free trade agreement between China and Chile[53]. Here, there are provisions throughout the treaty which refer to the protection of intellectual property in connection with different aspects of collaboration between these two countries. For example, Article 11 establishes that each party shall make provisions to the effect that a rights holder can initiate procedures for the suspension of suspected counterfeit trademarked goods or pirated copyrighted goods by customs authorities. Article 106 makes it

[52] An example of important reforms to national legislation after this treaty are the provisions in relation to exceptions and limitations for copyright infringement as well as the limitations of reasonability for service providers. Although the need for increased legal provisions in relation to the exceptions and limitations was present prior to this treaty already.

[53] The complete text of the free trade agreement can be found under http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=239610

clear that cooperation in research, science and technology should be in the interest of both parties and in compliance with their policies, particularly mentioning the regulations referring to the use of intellectual property which comes from such research and highlighting this as an aspect where protectionist measures as considered in line with social considerations.

In Article 111 of the agreement, the aims of the cooperation on intellectual property protection are clarified as extending the requirements contained in international agreements to which both parties assigned. In addition, other aims were considered to be the increase of economic and social growth, especially in the digital economy, and technological innovation and dissemination which would be beneficial to producers and users of both parties as well as obtaining a higher balance between the rights of the rights holders, legitimate users and the community. This highlights that, in this agreement, not only is economic rights protection at the forefront of minds but also collaboration and, to some extent, the development of social benefits, which is in line with principles such as embedded liberalism. The particular nature of copyright as revolving around both the interests of the rights holders and those of users, is recognized through the consideration of the potential benefits gained from this treaty. In addition, the need for balance within the legislative provisions has been specifically underlined by the parties in this Article.

The issue of cooperation is at the forefront of the IP provisions included in this treaty. Reference is made to cooperation in relation to the education and spread of projects which utilise IP as a tool for research and innovation, as well as the information exchange on implementation systems and initiatives to raise awareness of IP rights and systems. Other cooperation revolves around the policy dialogue on regional and multilateral IP initiatives, notification on enforcement centres, reports on legislative developments and related jurisprudence as well as increasing the knowledge of electronic systems employed in IP management. This also draws attention to the importance of the institutional sphere in implementing and enforcing the obligations contained in this and other bilateral treaties.

Chile and its Bilateral Treaty with Mexico

Subsection B of the Mexico - Chile trade agreement is concerned with provisions in relation to the protection of Copyright and related rights[54]. Here, extensive reference is made to the provisions contained in the Berne Convention in relation to the works that are awarded such protection, in particular, computer programs and data compilations. Another paragraph deals with the protection granted to performers as in accordance with the Rome Convention and the protection of phonogram producers in accordance with the Geneva and Rome Convention. Similarly to the previously mentioned agreements and many others that Chile has entered into, this section puts the additional protectionist measures in the context of international treaty obligations. The reigning principles of national treatment and the most-favoured-nation are vital considerations when entering into bilateral trade agreements that further influence national law and application on copyright issues, particularly since commitments made to one partner can easily be expected later on by another and therefore the limited scope and application of obligations is impossible to hold.

The duration of protection was established to be a lifetime plus an additional 50 years, while the minimum duration for phonogram producers and performers was set at 50 years from the end of the calendar year when the fixation of the work took place. However, it is also specified that the parties shall allow for certain cases to be exempt or limited under copyright protection as long as these do not conflict with the usual exercise of rights and do not prejudice the interests of the rights holder. This requirement is essentially mimicking the flexibility provided under the TRIPS agreement, without going into additional detail as to what exceptions would be necessary or desirable for the trade partners. Therefore, once again, the lack of specific balancing obligations and the contrastingly more detailed attention paid to protecting regulations can be noted.

Chile and its Bilateral Treaty with the EU

Another Treaty which is essential for the understanding of the diverse regulations Chile is subject to, is that between the European Union

[54] The complete text of the free trade agreement can be found under http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=196020

and Chile[55]. Here, Article 32 makes it clear that the parties ought to cooperate in the scope of their possibilities on the promotion, distribution, development, management, harmonization, protection and enforcement of intellectual property rights. Further, Article 32 provides that measures should also be taken to inhibit the abuse of rights, to combat counterfeiting and copyright piracy as well as extending and strengthen the national control and protection of rights granted in relation to intellectual property. The second subsection of this article provides a list of activities in which technical cooperation may be centred on by the parties. Another field of cooperation was identified as the provision of advice in relation to organizational structures used in the protection of these rights, training in relation to the management of IP rights as well as the training of judges and officials and outreach projects directed towards the private sector and civil society. The strong focus on cooperation in terms of copyright protection and its enforcement through institutions is remarkable, since it shows a focus on the importance of protecting the creator's rights, while simultaneously aiming at developing a stronger framework for the safeguarding of them. Yet, once again what is absent is a focus on the provision of a balanced framework.

Chile and TRIPS+ obligations

It can be seen that there are great differences in the provisions and approaches incorporated in bilateral agreements with Chile. For example, while the USA treaty provides extensive rules for how and what should be done by the other party, the EU treaty is much more focused on providing scope for growth and education, rather than "forcing" set rules onto another national legislation. Yet again, many of the other treaties entered into by Chile only contain short provisions for intellectual property protection. For example, in the treaty between Chile and the Central-American Union[56], Article 3.12 contains provisions for the protection of geographical indicators and makes special reference to consistency of provisions to those of TRIPS. Some treaties, such as the one between Chile and Venezuela, make no specific provisions for the protection of Intellectual Property rights.

[55] Full text can be found: www.sice.oas.org/TPD/CHL_EU/CHL_EU_s.asp

[56] The complete texts of many Chilean and additional free trade agreements can be found under http://www.sice.oas.org/agreements_e.asp

What can be seen in the above section is that some of the agreements to which Chile is a party have a much more extensive focus on economic rights and benefits, while others also incorporate social developments and concerns that are shared between nations. One bilateral agreement is often very distinct from another. The distinct economic as well as social priorities of the contracting parties are reflected in the legal provisions they focus on and establish in their trade agreements. This in turn highlights the importance of knowledge and understanding by the parties of all the long and short term implications that these types of agreements can have, once they are carried through into the national legislation. The more obligations Chile is subject to, the more restricted it is in choosing the best way of establishing and enforcing a legal framework that acts to the benefit of different interest groups and in which these national needs and preferences are incorporated.

Chapter Conclusions

The above explanations give a clear indication of the importance that international institutions and treaties have on our world in general and on IP protection specifically. The central aim of all of these institutions is to improve the collaboration and understanding between nations. An important tool to achieve this are legal principles which are applicable beyond borders, as these provide the foundation for trade and integration to take place. The initial international organizations have laid the groundwork and the attitudes displayed by nations within their forums are a good indication of their general attitude towards international collaboration. Since particularly the enforcement of TRIPS largely depends on the national institutions and their legal implementation as well as interpretation of TRIPS, the different preferences and approaches of member countries are important to consider.

One important point that should be carried forward from this chapter is that, countries cannot be generalized just because they participate in the WTO and TRIPS. All three countries have demonstrated a distinct historical background of international participation and with that, their interpretation and application of general binding agreements has been shaped differently. For example, Ecuador has demonstrated repeatedly that it has a strong preference for the consideration of national social needs and therefore its

international interactions have reflected this, as can be seen by the speeches and reports prior to and after its accession. Chile and the UK exhibit preferences that are more orientated towards economic gains and trade relationships built on preferential partners which support mainly the creators and creative industries. The balance between economic and social considerations is more evident in Ecuador's approach since, here, international cooperation has been more restricted in circumstances when it felt that its social needs were not taken into account.

Another point that is therefore apparent from this chapter is that not all developing counties are the same in relation to international collaboration. Ecuador is more focused on regional integration and Chile on bilateral treaties, yet both are part of TRIPS and the other WTO agreements. The value of this research in demonstrating marked differences in priorities and approaches between developing countries in Latin America is significant, since it highlights the danger of generalizing excessively. Further, it is vital to recognize that the different approaches pursued by these countries have a direct effect on their commitments for copyright protection. Like the UK, both have to also either implement regional requirements or bilateral treaty obligations, apart from TRIPS. Therefore, the national implementations in member states (developed and developing) are shaped, not only by TRIPS, but also by other frameworks, which are interlocked rather than parallel to each other. In order to provide further understanding of these additional provisions, the next chapter will explore what differences there might be in relation to the implementation and the balancing preferences between regional organisations.

Chapter 4

Regional Organizations and Legislation

The purpose of this chapter is to provide an overview of the regional provisions which influence national legislation, and are simultaneously subject to TRIPS provisions. It is important to understand the regional as well as international context in which national legislation operates. Once again, these regional copyright laws and institutions can be understood in light of the previously explained concepts of embedded liberalism and constitutionalization, in terms of socio-economic balance and the legitimization of trade markets through institutional operations[1].

The essential aim behind both TRIPS and regional legislation is to harmonize the framework for the protection and use of copyright across national borders. One guiding thought behind such harmonization is that it provides security and predictability, not only for the creation of such works, but also for trade and investment into the industry of goods and services derived from them; these principles can be seen as being emphasized in embedded liberalism[2] and constitutionalization[3]. Therefore, it has the potential to contribute to the economic development and growth of the countries engaged in the trade of these goods. It is however rather difficult to find the balancing point between the necessary harmonization and allowing member states the freedom to adapt the system to their own social needs and preferences. The issue of balancing competing interests and

[1] Please refer to chapter 1, particularly, the statements made by Ruggie and Trachtman.

[2] For instance see: "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi E. Abdelal and John G. Ruggie, New Perspectives on Regulation, page 151–162. Cambridge, 2009

[3] For example explained in: "Economic Analysis of Prescriptive Jurisdiction and Choice of Law", Joel P. Trachtman, page 68

preferences as part of a copyright framework still holds true in this different context of regional legal systems and harmonization. It is important not to consider national legislation on its own, nor should one exclusively look at the influence of TRIPS or regional agreements, since they are interrelated and the influence exerted is interchangeable at all levels.

Overview of Regional Organizations

The countries which have been selected for this analysis (Ecuador, Chile and the UK) provide us with a set of information and primary data that exemplifies the impact on national legislation and approach, of regional organizations on one side and bilateral treaties on the other. Regional organizations are essentially based on both the top-down influence of supranational institutions and legislation (such as regional courts and commissions), which influence national implementation region-wide. Simultaneously, national representatives can express concerns and shape policy through intergovernmental and democratic participation (through a regional parliament, for example). This means that the law maker ought to be both influenced by national voices as well as guided by them[4].

These complex attributes of cross-border democratization are an essential attribute of regional collaboration, since the member states do not only have to legitimize their actions towards each other but also their citizens[5]. In order to have this legitimized legal and political power, regional unions are required to conduct some sort of deliberation prior to concluding an agreement and acting upon it. This exchange of ideas, information and discussion between participants is necessary in order to come to the formation of a common interest which can then be pursued in a more unified manner[6]. For the establishment of common legislative provisions,

[4] "The foundations of European Community Law", T.C. Hartley, 2003

[5] In “Democracy, Solidarity and the European Crisis” Lecture delivered by Professor Jürgen Habermas (26 April 2013, Leuven) for instance Habermas argues that the EU legitimizes itself through the outcomes of its actions, rather than through the representation of the citizens political will.

[6] The definition of deliberation given by Simon Chambers is quite suitable here. He defines it in the context of deliberate democracy as: “is debate and discussion aimed at producing reasonable, well-informed opinions in which participants are willing to revise preferences in light of discussion, new information,

decisions and actions need to be taken which not only consider individual rights, but also the common good, and this on a supra-national level. Chambers summarizes the argument in relation to this relationship between rights and democracy as follows; "We are legal persons protected by rights only to the extent that we are authors of those laws. We are authors only to the extent that we are persons under the law."[7] The close geographical, historic and cultural connection that exists between member states of a regional organization provides these with an essential attribute, namely that of a collective identity. This understanding of unity in the wider global context is something that is still missing from the international community of the world's peoples[8].

In order for such a deliberative democracy to operate both legitimately and efficiently, the institutions which form and support it are essential. These institutions are the ones who are ultimately accountable for reflecting the people's shared preferences in the establishment and enforcement of common legal rules. In this context, regional laws can be understood as a way in which communicatively generated power is transformed into administrative power[9]. This process however can be used by certain pressure groups to directly influence political power by manipulating public opinion or administration in a way which benefits their interests[10] and in this, distorting the delicate balance that ought to be struck between all major interests.

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and claims made by fellow participants. Although consensus need not be the ultimate aim of deliberation, and participants are expected to pursue their interests, an overarching interest in the legitimacy of outcomes (understood as justification to all affected) ideally characterizes deliberation". "Deliberative Democratic Theory" Simone Chambers, Annual Review Political Science, February 2003, page 3

[7] "Deliberative Democratic Theory" Simone Chambers, Annual Review Political Science, February 2003, page 4

[8] This distinction has been explained by Jürgen Habermas in "The Postnational Constellation: Political Essay", Transl. M Pensky. Cambridge, MA: MIT Press. 2001, page 107

[9] "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy", Jürgen Habermas (1996) tr. William Rehg. Cambridge, MIA: MIT Press. page 150

[10] "Communicative Power in Habermas's Theory of Democracy", Jeffrey Flynn, European Journal of Political Theory 3(4), 2004

The dynamic of cross-border co-operation on the one side and the need to fight for national preferences on the other, is also experienced in much of international constitutionalization and institutionalization, as increasingly open markets (both regionally and internationally) require more legislation and administrative institutions to establish and implement these strategies[11]. However, regional organizations have one particular advantage in contrast to the wider international collaboration, as their members are mainly united by common goals and concerns[12], therefore providing a forum for these particular interests to be taken into account when regional legislation is drafted and implemented by institutions and courts. This is particularly relevant when considering copyright law and the essentially competing interests between the rights holders and those requiring access. Depending on a country's dependency on either the creative industries or the need for social developments, regional organizations can adjust the harmonized legal framework in a more detailed and balanced manner than a global treaty is able to. The increased constitutionalization that regional organizations establish for their member states has an increased consideration for their particular preferences and needs while simultaneously providing a cross-border framework that allows increased predictability and stability for the open market exchange of culture, knowledge and goods.

- ***Latin America – an example of particular theoretical applications***

The previous explanation in relation to the complex framework in which national legislation are placed are particularly relevant in the specific context of Latin America, since there are a number of concerns which have to be taken into account. A number of Latin American countries are facing problems leaving the middle-income-country-trap, which in turn would enable them to provide more social and economic welfare to their people. In order to leave this position, potential changes include the necessity to

[11] Please refer to chapter 2 and particularly to the article "A functional Approach to International Constitutionalization", Jeffrey L. Dunoff and Joel P. Trachtman, Ruling the World – Constitutionalism, International Law, and Global Governance, 2009

[12] Chapter 5 in relation to the motivations of the Andean Community, but similar understanding can be seen within the EU as well.

open up more competitive markets[13]. The ability of regional cooperation and economic integration to respond to these issues is considerable. The interconnection between economic and social developments exemplify, as in embedded liberalism, the ability to regulate the economic detriments caused by trade liberalization which are softened to benefit social welfare. Provisions to this effect in turn benefit from integration into an increasing constitutionalization on a regional level as well as through the support of institutions which go beyond national borders. Open competition and liberalization of cross border trade does not only contribute to the balancing of markets, but it also requires the active influence of the state by means of legislative regulations and institutions to prevent the abuse of market powers against consumers[14].

In relation to Latin American integration, one can observe the complementary nature of the relationship between globalization and internationalization in the course of regionalization and simultaneous integration into trading blocs[15]. Both globalization and regionalization are present in Latin America. This is represented in the legal agreements which the different countries have entered into, such as the agreements formed by the Andean Community and MERCOSUR. The aim behind a significant increase in intra-regional trade itself is not just the strengthening of the Latin American bloc as such, but rather the principal objectives of Latin American integration can be considered as peace, economic development, geopolitical development and the rule of law, for the benefit of the people and intra-state integration[16]. This is again very much in line with the understanding of the balance proposed by embedded liberalism and the

[13] Explanation of Latin Americas specific considerations in the international system can be found in - “Libre Competencia y Liberalization Desafios para la Integration en America Latina”, Aldo Gonzalez and Sergio Espejo, article based on a presentation given at the Seminar on "Emerging Issues for Latin America 2015 - 2020" organized by CIEPLAN, 2013

[14] This is supported by authors like Gonzalez and Espejo, see reference above.

[15] This is well examined in “Teoria Juridica de la Integracion Latinoamericana”, Ricardo Schembri Carrasquilla, Latin American Parliament, Sao Paulo, 2001

[16] Explanations in support of this can be found in Schembri’s article reference above.

concept of proportionality within law[17], in that it ensures that not only economic objectives are supported in regional integration, but also social developments. In Latin America, as well as in general, open economies which favour deregulation have in the past experienced issues with power abuses and then require a reinforcement of institutional mechanisms, these specifically include regulations and laws that are enforced and resolved by the corresponding agencies[18]. The continued institutionalization within Latin America in the form of regional organisations is an important aspect in providing increased stability to the region and therefore supporting further trade and investment.

The specific relevancy of intellectual property agreements for Latin America has to be considered in the context, that after the Uruguay Round, many developing countries felt pushed towards the liberalization of trade, investment and technology, to an extent to which they did not feel comfortable[19]. For many of these countries, the concept of protecting knowledge and cultural goods is relatively recent and does not form a long integrated part of their understanding and exploitation of creative works[20].

[17] The understandings of proportionality also have to be considered not just in their standard context of judicial application but rather on how they are modified to a certain extend to fit into the Latin American legal perspective. In "The Tropicalization of Proportionality Balancing: The Colombian and Mexican Examples", Luisa Conesa, 2008, Cornell Law School, Inter-University Graduate Student Conference Papers. Paper 13. Here, it was shown that the Colombian courts evolved a test which combines the European (German) test of proportionality in the narrow sense with the varying degrees of scrutiny inherent in the American approach. The Mexican courts have employed a similar interpretation based on rational review and strict scrutiny of analysis combined with the European understanding of proportionality as explained by Alexy. It can be observed in those two Latin American jurisdictions that there is a tropicalization of the European test of proportionality by adding aspects of their own constitutional understanding and the American jurisprudence to make the concept of proportionality their own. This is relevant to the understanding of the role that regional organizations play in harmonizing and stabilizing a certain legal approach across their member states and the influence this has on the member states national framework in terms of implementing and evaluating legal balances, such as are inherent to copyright protection and the competing interests and rights of right holders and users.

[18] See Gonzalez and Espejo's article above referenced number 13

[19] This has been explained for instance in - "Tratados de libre comercio, derechos de propiedad intelectual y brecha de desarrollo: dimensiones de politica desde una perspectiva latinoamericana", F. C. Sercovich, 2008

[20] Explainations to this edffect can also be found in the Sercovich's work cited above.

In addition, these are the countries which above all do not only have to focus on the economic benefits of creative industries but instead also face challenges of a more elementary nature, such as increasing the access to information and with it supporting social objectives such as the fight against inequalities in opportunity and income[21].

The problematic perception of copyright protection in this context is boosted by the explanation that national and international IPR legislation have continued to be strengthened and expanded after the signing of the TRIPS agreement, both on a national level by many developed countries and also by international treaties such as the WIPO Patent Treaty as well as through bilateral trade negotiations. This is evident through the growing number of rights awarded to authors and industries under trade agreements, while on the other hand, there are only very limited possibilities and even fewer obligations to provide a reasonable level of exceptions for access, exchange and co-operation for the benefit of users and innovators[22]. The negotiations for the TRIPS agreement reflected a struggle between the developed countries' wish for increasing IPR protection and the developing countries' attempts to provide safeguard measures to benefit their social priorities and developments. The minimum standards introduced by TRIPS were considered as a way of accommodating the first side, while the flexibilities set on the exercise of these rights and the establishment of limitations is often construed as being a way of accommodating the second[23]. However, the fact that these provisions for limitations and exceptions are not obligatory shows the strong misbalance inherent in this agreement, which also affects many Latin American nations.

[21] This can be supported be the arguments made by Sercovich in the above reference.

[22] A specific example given here by Sercovich is the US, who justified their support of the publishing industry on their need to promote their own cultural heritage, while simultaneously refraining from recognizing the rights of foreign copyright holders, page 29

[23] This is supported by the explainations in "Tratados de libre comercio, derechos de propiedad intelectual y brecha de desarrollo: dimensiones de politica desde una perspectiva latinoamericana" F. C. Sercovich, 2008

Andean Community – a forum of economic and cultural integration

- ***Essential Principles***

The Andean Community is formed of countries which joined together voluntarily in order to work for a more developed, balanced and independent region. It is one of the oldest unions in Latin America[24]. The four countries which currently constitute the Andean Community are Ecuador, Colombia, Bolivia and Peru. Strong focus is placed on the historical, cultural and natural aspects and objectives which these countries have in common in order to establish a basis for cooperation. At the same time, all of these countries are characterised by a wide cultural, ethnic and linguistic variety[25]. It is important to note the emphasis not only on economic growth and exchange through trade, but also on the social and cultural benefits of integration.

The first steps towards this union date back to 1969, when the four current member states and Chile signed the Cartagena Agreement, with the motivation of improving the standard of living for their people by focusing on regional integration through economic and social cooperation. In 1973, Venezuela decided to join the Andean Group, while Chile withdrew from it in 1976. All the institutions, with the exception of the Andean Presidential Council, were formed in the seventies during which period the general concept was that of import substitution which helped to protect the national industries, while additional revenue was generated through import tariffs. This time was also marked by significant state evolvement through planning and management of economic activities. The eighties were marked by a debt crisis in the region which led to the integration not being pursued further. However, this crisis was one of the main motivators to abandon the old system and instead increase efforts and resources

[24] Formally it can be considered a sub-regional organization but for the purposes of this PhD it will be considered a regional organization.

[25] More information on the evolution of CAN can be found for example in "Contexto histórico y avances de la integración en la Comunidad Andina", Alfredo Fuentes Fernández, 2008, OASIS, Number 13 pages 177- 196

towards an open market model for trade. A free trade area was officially formed in 1993.

Apart from economic liberalisation in the last few decades, a social agenda was formally introduced to the Andean integration strategy in 2003, which in turn led to the formulation of an Integrated Social Development Plan. A further widening of the areas of cooperation and concern between CAN members was made in 2007, by agreeing to promote a more balanced integration of social, cultural, economic, political, environmental and trade aspects. Further, the Andean Strategy for Economic and Social Cohesion and the Social Andean Millennium Development (OANDES), which seek equality and the achievement of further goals by 2019 (the 50th anniversary), were agreed to[26]. These developments again exemplify the strong connection between economic liberalisation and social development in the Andean Community, as it is essential to the concept of embedded liberalism and rights balancing within legal frameworks and particularly copyright protection.

- ***Andean Community Institutions***

The Cartagena Agreement sets out the essential principals and objectives of Andean integration, while it also establishes the institutional framework which is necessary in order to achieve these. A major part of the smooth development of strategies, policies and guidelines, which have helped to strengthen the position of CAN through the establishment of laws as well as balanced application, is precisely the increased institutionalization of CAN[27]. The General Secretariat and the Court of Justice are the main bodies which resolve disputes and apply the law within the community. One of the Secretariat's responsibilities is to make sure that the member states comply with the legal provisions of the Community; in relation to this it is also vested with the power to resolve issues in relation to matters under the

[26] More detailed information on these goals can be found in the "Statement from the Andean Ministers for Social Development", 6.July.2011, the full text of this can be found at http://www.comunidadandina.org/documentos/actas/declaracion_oandes.pdf

[27] Please refer to the previous explanations made in relation to constitutionalization and institutionalization in chapter 2 and particularly the articles referred to by Dunoff and Trachtman

Cartagena Agreement[28]. It also has the power to intervene in a case as a party in front of the Andean Court, in case a member state does not recognise that it is in breach of regional legislation. It also corresponds to its role to maintain working relationships with the executive bodies of other regional integration organizations as well as to cooperate with international organizations.

The Court of Justice was created in 1979 and began operating in 1984 and its name was changed to the Court of the Andean Community in 1996. It is a permanent and supranational community institution and was created in order to make decisions on the legality of Community law and also on how to interpret such. This is necessary in order to ensure the uniform application across all member states. It is the highest level of regional community law, due to the principles of direct effect and supremacy of the decisions taken by this court. "Until 2010, the Court has seen performances of 1813 rulings requested by national courts, 116 infringement actions against Member Countries, 50 actions for annulment and labour proceedings for the inactivity of official bodies, ranking as the third most active international court in the world after the European Court of Human Rights and the Court of Justice of the European Union.[29] "

The Andean Presidential Council is the highest body within the system and it takes the political decisions and develops guidelines which are then implemented by the other bodies of the Community. It was created in 1990 and comprises the heads of state of each of the member countries[30]. The Commission of the Andean Community is formed by the representatives of each of the governments and its main function is legislative decision-making, with a particular focus on trade and investment. Its decisions are binding on all member states and its purpose is to

[28] More information on the Andean General Secretariat can be found at, http://www.comunidadandina.org/Seccion.aspx?id=26&tipo=SA&title=secretaria-general-de-la-comunidad-andina, last accessed 25/10/2012

[29] More information on the Court of the Andean Community can be found at, http://www.comunidadandina.org/Seccion.aspx?id=29&tipo=SA&title=tribunal-de-justicia-de-la-comunidad-andina, last accessed 25/10/2012

[30] More information on the Andean Presidential Council can be found at, http://www.comunidadandina.org/Seccion.aspx?id=9&tipo=SA&title=consejo-presidencial-andino

develop, implement and analyse integration on trade and investment policy, though reaching joint positions on their areas of competence[31].

Another important institution of CAN is the Andean Parliament which represents the people and is formed by members elected directly in each member state. It was created in 1979 and each member state sends five elected representatives to the parliament. The president of the parliament is elected by the parliament. The standing committees of the parliament are entrusted with the analysis, evaluation, proposal, control and harmonization of the areas of powers described in the Cartagena Agreement. These powers include the guidance and support of integration, political control to review the progress of integration and the attainment of objectives as well as to promote the harmonization of laws within the Member Countries[32].

The complex structure of this institutional framework shows that the application of the laws is as relevant to the operation of a legal framework among the member states as the establishment of such legislation. While legislation is essential to provide predictability and stability to the people, the institutional component has to have the authority and respect to oversee and safeguard the application of them in the member states. Particularly the General Secretariat, Andean Court and Parliament are highly relevant not only for operational aspects of CAN, but also for the effective overseeing and enforcement of community law. As part of the exercise of these functions, both institutions are able to remind and guide member states along the path of implementing and interpreting legal provisions in the light of the balance of economic and social interests important to CAN. This shows once more the essential connection between the legislation which can incorporate the balance of the embedded liberalist principle of social values within an economic expansion and simultaneously

[31] More information on the Andean Commission can be found at, http://www.comunidadandina.org/Seccion.aspx?id=21&tipo=SA&title=comision-de-la-comunidad-andina, last accessed 25/10/2012

[32] More information on the Parliament of the Andean Community can be found at, http://www.comunidadandina.org/Seccion.aspx?id=34&tipo=SA&title=parlamento-andino, last accessed 25/10/2012

requires increased institutionalization and constitutionalization for it to be enforceable.

When talking about the Andean Community, one can refer to it as a sub-regional organization which has had the tendency to join agreements that are more ambitious and profound than simple free trade agreements, while also highlighting the complex institutional framework it is based upon[33]. The benefit to the Andean Community of having many permanent staff members in these institutions can be understood as a qualitative attribute of its harmonization. The attributes explained in this section clearly highlight the importance of institutionalization as a part of constitutionalization within the Andean Community, while also clarifying that trade liberalization is embedded in its social community[34].

- ***Intellectual Property Protection within the Andean Community***

The Common provisions for Copyrights and Related Rights are contained in Decision 351, which was adopted in 1993 and recognized the corresponding protection to authors and other rights holders in relation to original works in literary, artistic or scientific areas irrespective of their artistic merit or mode of expression. As explained earlier in this section, regional law has a direct effect on the community and national law and many of these regional agreements have foreseen the provisions contained in the TRIPS Agreement, which lead the member states to have an easier accession to the WTO. The harmonization of the IPRs was essential for the growth of the market because of their influence on the free movement of goods and promotion of competition[35]. This decision lays down all the

[33] Can be seen in Schembri's article with the reference number 15

[34] Some arguments can even be made in the formation of a Latin American Union which would aim at creating more democratic stability through an increased homogenization with supra-national institutions that are capable of creating and administrating binding community law based on common policies. See for example: "Teoria Juridica de la Integracion Latinoamericana ", Ricardo Schembri Carrasquilla, 2001, For him this idea is feasible if pursued correctly due to the economic and political resemblance of the Latin American nations.

economic and moral rights to which authors are entitled and established the minimum period of protection as the author's lifetime plus an additional 50 years[36]. In the case of an infringement of these rights, the responsible national authority is entitled to order immediate cessation of the illegal activity, the seizure, forfeiture or confiscation of the illegally produced copies and of the machines used to do so. The related rights have also been recognised and the same minimum protection term was established; these rights protect performers, phonogram producers and broadcasters[37].

The economic importance of copyright protected works for Latin America and the Caribbean can be seen in the report about this issue by the Latin American and Caribbean Economic System[38]. Here there are listed several points which make copyright protection worthwhile, these include, for example, that cultural industries are often very dynamic sectors in the international economy. It was argued that the protection of culture can also be a resource to combat poverty and inequality as well as through the provision of employment, while in its combined effort it can also be "the catalyst for a more comprehensive, balanced and inclusive welfare to be generated"[39].

The combination of culture and development of information technology have been clearly identified as an essential principle for the sustainable development of the region[40]. In the Andean region and in much of Latin

[36] For further details please refer to the following section of this chapter on Andean legislation

[37] The common framework for Intellectual Property protection is created by several regional legislations, one for Industrial Property (Régimen Común de Propiedad Industrial (486)) , Copyright and related rights (Régimen Común sobre Derecho de Autor y Derechos Conexos (351)) as well as for plant breeders rights (Régimen de protección de los derechos de los obtentores vegetales(345)) and in relation to genetic resources (Régimen Común sobre Acceso a los Recursos Genéticos (391)), the full text of these can be found at http://www.comunidadandina.org/Seccion.aspx?id=83&tipo=TE&title=propiedad-intelectual

[38] "Incentivo a las Industrias Culturales y Creativas en América Latina y el Caribe", Latin American and Caribbean Economic System, 2011

[39] Report refered to above in reference number 38, page 50

[40] WIPO, "La Contribución Económica de las Industrias del Derecho de Autor y los Derechos Conexos en Colombia", Alberto Castañeda, Rafael Cubillos, Armando Sarmiento, Jaime Vallecilla

America, a great deal of importance is placed on the protection of genetic resources, traditional knowledge and intellectual property as a whole. The meeting of members of the Action Group of Like Minded Megadiverse Countries made it clear that "the Group of Megadiverse Countries must insist on the fact that these IPRs have historically been and must continue to be a tool to promote industrial, scientific and technological development, and must spread such information, especially in developing countries"[41].

The above explanations do not only highlight the importance and development of IPRs in the Andean Community, but also shows how they can promote social developments through provision of employment and/or opportunities for knowledge growth, if adequate balances are provided in the system. Such a balance however has to be based on an understanding of the social needs and the redistributive actions that need to be incorporated into the framework. Otherwise the provision of employment opportunities, for example, would benefit those parts of society that are best educated while those that lack the economic ability to gain access to knowledge and education would be even more impacted by restrictions. Therefore, the institutions play an important role in identifying problematic implications and aim to provide counterbalancing provisions that further the social development and a more even economic distribution of the region.

European Union – European integration of economic and social matters

- ***Essential Principles***

The EU can be defined as the economic and political partnership between its 27 member states. Although it was originally created on a purely economic basis, it now also concerns policy areas such as development aid and environment. The working principles are contained in the treaties to which member states voluntarily agree. These binding agreements provide the legal basis for the EU, while also setting out the objectives and goals for the future. The essential values to which it assigns are human dignity, freedom, democracy, equality, the rule of law and the

[41] This document can be found at http://www.comunidadandina.org/ingles/documentos/documents/cusco29-11-02B.htm

respect for human rights. The EU institutions and the national governments in their application of EU law, have the legal obligation to uphold these. The main economic drive is the single market policy, meaning that goods, services, money and people can move freely between the member countries. In recent times the focus of the EU has been towards an increased transparency and democracy in its instructions, which can be seen in the Lisbon Treaty since it set out several institutional reforms[42].

The formation of the EU was motivated by the end of the Second World War and the aim to terminate frequent and violent disagreements between European neighbours. Over time, the EU has moved on from being mainly motivated by economic cooperation to also having regional integration on social matters. In 1950, the first formal step of such a union can be seen in the Coal and Steel Community, which sets out economic and political guidelines for member states to follow. In 1957, the Treaty of Rome then created the European Economic Community, which is characterised by its common market policy. In the 1960's, further economic liberalization is illustrated by the decision of EU countries to refrain from charging customs duties in intra-EU trade. Denmark, Ireland and the UK joined the EU in 1973. In 1979, citizens were for the first time able to directly vote for EU Parliament members. The Single European Act was signed in 1986 and established a six year programme which aimed to create a single market, allowing the free flow of trade across EU borders. The fall of the Berlin wall facilitated the completion of this single market in 1993. The Maastricht Treaty and the Treaty of Amsterdam as well as the Schengen Agreements were all signed in the 1990's. In the new millennium, the Euro was introduced as the common currency[43].

EU law is constituted from primary and secondary legislation. The treaties are considered primary legislation, while regulations, directives and decisions constitute the secondary legislation, as they are derived from the essential principles established in the treaties. The `Ordinary Legislative Procedure` is the common mechanism used for decision making; it refers to the fact that the elected parliament has to approve legislation in conjunction

[42] The full text of the Lisbon Treaty can be found at http://ec.europa.eu/archives/lisbon_treaty/full_text/index_en.htm

[43] For more information see for example “The European Union: Economics, Policy and History”, Susan Senior Nello, 2011, McGraw-Hill Higher Education

with the Council, while the Commission is responsible for the drafts and proper implementation as well as application of the law. Once again, this can be related back to the issue of deliberative democracy and the principles of embedded liberalism. The attributes of the EU are to have some extent of a collective identity and shared common interests and aims[44], provide the basis for a legislative framework that balances these interests for the benefit of economic as well as social integration and balance. The understanding of deliberative democracy in connection with principles such as reciprocity and a framework that goes expressly beyond that of supporting mere economic benefits, as well as the potential to have citizens assigned to a shared enterprise and based upon some form of collective identity[45].

- ***European Union Institutions***

The institutional framework of the EU can be summarized as follows; that the European Council established the general priorities by bringing together EU-level leaders, the elected Members of the European Parliament act in representation of the citizens, while the European Commission takes a stand for the interests as the EU as a whole and the Council of the European Union is the place for member states' governments to defend the national interests. The European Court of Justice and the Court of Auditors are very important; the first is responsible for the upholding of EU law, while the second oversees the financing of EU activities.

The European Parliament is directly elected every five years in order to represent the people. It is one of the main law-making institutions, as such it has three principle roles, the debate and passing of EU law (together with the Council), examination of other EU institutions, in particular the Commission in order to verify their democratic working (through the analysis of reports and interviews with Commissioners) and it

[44] See above comment on Habermas's understanding of democracy, reference number 10.

[45] "Deliberative Democratic Theory", Simone Chambers, Annual Review Political Science, February 2003, pages 7 - 9

also debates and adopts the EU budget (together with the Council)[46]. Ministers of the European Parliament (MEPs) have the possibility to establish inquiry committees in response to petitions from citizens. The number of MEP for each country depends on the population of that member states.

The Commission on the other hand comprises one Commissioner from each member state, who are in term for five years and receive specific responsibilities in policy areas from the President. The Commission is the institution which should represent and defend the interests of the EU as a whole. In order to do so, it supervises and implements policies through its propositions of new laws to the Council and Parliament, as well as by managing the budget and allocating funding, it joins the Court of Justice in order to enforce EU law while it also acts as the international representative in relation to negotiations between the EU and external countries.

Similar to the Commission, the Court of Justice has one judge from each of the member states, who are in their position for six years and receive support from eight advocates-general. The advocates-general are entrusted with the presentation of public and impartial perspectives on the cases heard by the court. In order to lessen the burden on the ECJ and improve the legal protection of citizens, there is also the General Court which decides cases brought before it by private persons, companies and some organizations as well as cases which arise out of competition law. The essential function of the ECJ is to ensure the uniform application of EU law across its members, while it also resolves disputes between governments and institutions as well as cases arising out of the consideration of infringed rights from an individual, company or organisation by an EU institution[47]. These institutions are a vital part of the development, integration and stability provided by this regional organization, since they ensure that the commitments and rights granted in agreements and community legislation are adequately balanced and enforced. In addition, these institutions, similar to those from the Andean

[46] An important change was brought by the Lisbon Treaty, since it increased the areas of policies which are decided by the ordinary legislative procedure, thus providing the Parliament with more powers to decide on laws concerning agriculture, energy policy, immigration and EU funds.

[47] More information about the Court of Justice can be found at www.europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

Community, also play an important role in legitimizing the application and function of the legal framework in relation to its interpretation and enforcement. The way in which focus is placed by the EU institutions on relevant aspects of policy also reflects at a later stage on member states' implementation of social and economic provisions.

- ***Intellectual Property Rights in the European Union***

The position taken by the EU in relation to copyright protection is clearly expressed in the directives and regulations which have been passed in relation to this area of interest. These texts are vital for the harmonization of trade, since they provide predictability and stability to the actors involved, while also, to some extent, balancing the diverse interests and priorities relating to copyright in particular. First of all, the importance of copyright related industries within the EU economy should be understood.

The creative industries which are copyright protected amounted to 3.3% of the EU's GDP in 2006, while there were also about 1.4 million small-and-medium sized companies working within this sector which in turn represented 8.5 million jobs. It should also be noted that there was a significant increase in employment in the knowledge based industries of the economy amounting to an increase of 24% in comparison to 6% in other sectors[48]. A significant portion of these numbers are created by the cultural industries, which include the audio-visual sector; they contribute an annual market value of €500 billion, while this area of the economy is also vital for the promotion of innovation. On a global comparison, there are more films produced in Europe than anywhere else and the TV viewing numbers are the second highest around the world, there also exists more than 500 online video services. The EU is home to more than 250 national collecting societies which collectively manage revenues of €6 billion every year. Their importance in the music sector is particularly apparent as here they collect about 80% of the total revenue. The increasing use of online music service providers has marked the importance of collective rights management and related licensing schemes[49].

[48] Commission sets out "blueprint" for Intellectual Property Rights to boost creativity and innovation, EC press release, Brussels, 24/5/2011

[49] Copyright: Commission proposes easier music licensing in the Single Market, EC press release, Brussels, 11/7/2012

In relation to the protection of copyright, it can be said that the law has been and still continues to be harmonised across the EU. Further, the Commission made it clear that more uniformity and reform is needed in relation to responding to new ways to exploit copyright law and also in regards to the enforcement of these rights[50]. These harmonised standards are essential for intellectual property rights in the EU single market and it is also required in order to further strengthen their provisions for the management and licensing of these rights[51]. It is therefore explicitly highlighted that copyright law is by no means static, but that it constantly evolves in response to its environment.

A common guideline was set out by the Commission, to "strike the right balance between promoting creation and innovation, in part by ensuring reward and investment for creators and, on the other hand, promoting the widest possible access to goods and services protected". The importance of such a balance was further remarked in order to encourage investment and innovation for different businesses and this has a positive influence on the growth and competitiveness of the EU. Consumers are considered to be able to benefit from wider and uncomplicated access to information and cultural content. The establishment of digital libraries was also considered for the development of a knowledge economy, as they facilitate the distribution, access and preservation of intellectual and cultural heritage[52]. The Commission therefore pushes towards an agreement between libraries, publishers, authors and collecting societies to create a licensing solution for the digitalisation and making available of out-of-commerce literature[53]. The explicit recognition of the need for the copyright system to be balanced reflects an understanding of the close connection between economic and

[50] Copyright: Commission proposes easier music licensing in the Single Market, EC press release, Brussels, 11/7/2012

[51] Please refer to the next section of this chapter for more information.

[52] Commission consults on how best to seize the opportunities for TV and film in the online age, EC press release, Brussels, 13/7/2011

[53] Commission sets out "blueprint" for Intellectual Property Rights to boost creativity and innovation, EC press release, Brussels, 24/5/2011

social aims as well as the reasoning that a one sided support of interests would be detrimental to the region as a whole.

Regional Legislation

As previously mentioned, there is some form of a trade off when becoming a member of a regional organization. In turn for giving up some supremacy and the national legal system also playing a role as enforcer of regional laws, there are some benefits of regional cooperation. These include, for example, the increased flexibility to shape the implementation of international agreements in a way which is taking into consideration specific regional attributes and necessities. Therefore, the way in which interests and needs are balanced against each other can be structured and implemented to a degree and in a particular manner as best adequate for the circumstances of the member states. However, one of the challenges that any regional organization faces is to make sure that all member states cooperate not only for the benefit of their individual interests but also the regional interest as a whole. This has been explained previously in relation to the concept of deliberative democracy[54].

The motivation behind increased regional collaboration instead of simple bilateral or international cooperation was made clear by Ecuador in relation to the Washington Convention. Here, its delegate stated that from its perspective it was "easier to access agreements on a continental level to strengthen"[55] copyright protection and promote cultural exchange. This is a very valid point, especially taking into consideration the lengthy process involved if one seeks to amend international legislation, this takes several years and can at any point be blocked by one single nation's veto, while regional organizations on the other hand have a much lower number of participating states to worry about and in addition negotiations are often

[54] For more information see for instance: "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy", Jürgen Habermas (1996) tr. William Rehg. Cambridge, MIA: MIT Press. page 150; "Deliberative Democratic Theory" Simone Chambers, Annual Review Political Science, February 2003 and "Communicative Power in Habermas's Theory of Democracy", Jeffrey Flynn, European Journal of Political Theory 3(4), 2004

[55] Marco Rodríguez "Los nuevos desafíos de los derechos de autor en Ecuador", page 33

more successfully based on the similarities of backgrounds and interests shared between them.

Regional integration and collaboration within the Andean Community has also been based on the essential principle of cross border harmonisation of legislation[56], therefore also aiming to promote stability, predictability and development through an increased constitutionalization and institutionalization between member states' legal systems. There is a clear nominative consideration on the basis for this, as the absence of unified legal frameworks would have negative effects on both the lack of distinct rules within a region which is costly in relation to trade and the harmonized law in many cases can be seen as being a substantial improvement to the national regulations[57], since member states are supported and guided in their implementation of regional legislation. A stable and uniform legal framework to its member states is essential; it can only be considered effective if it is ensured through the supra-national institutions[58]. In turn this stable legal framework can be shaped in accordance to the member states' preferences, therefore implementing the international standards of TRIPS in a more individual manner, guided towards striking an adequate degree of equilibrium between regional concerns and interest groups.

Andean Community: Copyright Protection

- ***General Provisions***

The regulations in relation to copyright are contained in *Decision 351* of the Andean Commission, in which *Article 1* makes it clear that the aim of this decision is to recognize adequate and effective protection of authors and other rights holders in intellectual works, such as the literary,

[56] "Armonización de los Derechos de Autor en la Comunidad Andina: Hacia un Nuevo Régimen Común", Alberto Cerda Silva, 2011 The consideration of stability and predictability again plays an important role in the Andean Community- "Enhancing Legal Certainty in Colombia: The Role of the Andean Community" C. A. Rodríguez, 2009

[57] Some consideration to the motivations behind unified laws can be seen in "The Economic Implications of Uniformity in Law", Souichirou Kozuka, 2007

[58] Some background on the historic context and development of regional integration in the Andean Community can be seen in: "The Andean Community: Reaching Out to Bolivar's Dream", María Angélica Espinosa, 2001

artistic or scientific nature, irrespective of their genre or form of expression as well as of artistic merit or purpose. *Article 2,* on the other hand, provides for national treatment of rights holders in each of the member countries. *Article 4* in turn specifies that protection is awarded to all literary, artistic and scientific work, among others those which are expressed in writing, musical compositions, dramatic works, choreographic works, cinematographic works, works of art and architecture, photographic works, lists, compilations and computer programs. Adaptations, translations and other derivatives of the original work are protected under the provisions of *Article 5*. The independent protection from the material ownership is contained in *Article 6* while *Article 7* provides that it is the form of expression of an idea which is protected, not to the idea itself. It is also important to note that it is established under *Article 52* that the protection of literary and artistic works as well as for performances are not subject to any kind of formalities. These articles can be seen as setting the ground work for copyright protection across member states, with provisions which also very much reflect the international standard of protection contained in TRIPS.

- ***Moral and Entrepreneurial Rights in the Andean Community***

Provisions for moral rights are made in *Article 11*, as protecting the inalienable and non-transferable rights of non-disclosure of the work, claim authorship, subject to any distortion, mutilation or modifications. Further, *Article 12* makes it clear that the Member Countries have the liberty to grant other moral rights, but no specific obligation to do so.

In *Articles 13* of this provision the protection of entrepreneurial rights are established; these include, among others, reproduction, public communication, distribution, importation and translations or adaptations. Definitions of reproduction and public communication are contained in *Articles 14 to 17*. The duration of the protection is contained in *Article 18* as the lifetime of the author plus 50 years, but the possibility for Member countries to establish a longer protection period, in accordance with the Berne Convention, is contained under *Articles 19 and 20*. The protection for computer programs, on the other hand, is contained in *Articles 23 to 32*. The previously summarized Articles all reflect essential provisions for the

protection of the creator's rights, which are the foundation for the granting of further and more specific rights for the benefit of the author and the creative industries.

For example, the issues of related rights are contained in *Articles 33 to 43* of the Decision. First, it is made clear that the protection of the neighbouring rights shall not affect the copyright protection of scientific, artistic or literary works. Among others, it is further provided that performers have the right to authorize or prohibit the communication to the public in any form of the unfixed performance and the reproduction of their performance. The collective administration in turn is considered in *Articles 43 to 54*, which establish that the collecting societies are subject to inspection and supervision by the State.

Procedural aspects are considered in the following Articles; for example, it is established that national authorities shall observe due and adequate legal process as well as the equality of the parties. Another important point which was considered was the precautionary measures which can be ordered by the national authority, for example, the termination of the unlawful act, the seizure or confiscation of violating copies and materials which are used for the commitment of an offence.

The rights awarded to creators and creative industries through the establishment of these harmonized and binding legal provisions is very much a reflection of the standards agreed in the TRIPS agreement with some liberty of regional member states as to the way in which they implement them. This regional legislation provides protection to the creative industries and rights holders, therefore providing a stable ground for further investment and economic development, based on a predictable legal framework within the community.

- ***Exceptions and Limitations in the Andean Community***

The provisions for limitations and exceptions are contained in *Articles 21 and 22*. It is specifically stated that these exceptions shall only be given in cases where these do not conflict with the normal exploitation of the work. The provision of adequate checks and balances within the copyright system is essential in order to prevent it being monopolized to a point where it would lose the benefit for users and society at large. *Article 22* in turn specifies the minimum lawful exceptions; these include the quote

in a book with the provisions of the author's name and for the use in fair practice, reproduction for teaching or newspapers as long as this is within the proper practice and not subject to sale, as well as individual use without profit. In addition, a specific exception are made for libraries and archives in relation to the preservation or replacement of lost or damaged copies, and among others the communication of current affairs to the public, by means of photography or cinematography.

Some differences within the interpretation in the national law are tolerated, although differences could be barriers to trade and the free flow of copyright protected goods and services[59]. While the TRIPS Agreement provides some flexibility for national implementation, for example, in relation to the exhaustion of intellectual property rights, Decision 351 of the Andean Community also leaves some aspects free for member states to implement in accordance with their needs and priorities. However, it is clearly recognizable that provisions and balances established under regional legislation are more specific and harmonized than the broader international obligations. Yet, to some extent even this regional decision has been interpreted as reflecting a misbalance towards the protection of the author's rights rather than awarding more protection towards public and social interest. Examples of these rights which go beyond those required from TRIPS[60], can be seen for example in the right to control the importation of works and the wide reaching national treatment provisions[61] which award protection to rights which might not be protected in their country of origin.

[59] This is a similar approach as can be observed in the European Union in relation to the freedom of member states to implement and interpret the regional provisions in different manners as long as it is in accordance with the regional legislation and judgements.

[60] This is strongly advocated by Cerda in his article referenced under reference number 56

[61] The common legal system in the Andean Community also promotes the protection of works from foreign origin and that even if the other country is not protecting the work in question. This community protection is not only awarded to creators from member states of the Berne Convention but also to other countries.

At this point it is essential to note, that there are extensive provisions for entrepreneurial rights under the community legislation. There are also some balances established between them and the priorities of member states in regards to social developments and security. This is particularly evident from the establishment of binding minimum exceptions and limitations which should be carried through into national law by every member state. What is achieved through this explicit obligation is that not only the rights become predictable, but also the exceptions for social advancement, therefore allowing research, inventors, students and many users to benefit from a comparable standard of access and balance across the region. The uniformity of exceptions as well as rights is an essential security and shows the commitment to public access and social developments that CAN represents[62]. This can be interpreted as a clear step towards the recognition of the fundamental nature of copyright protected works which go beyond a pure means to generate income but instead also fulfil the function of providing modes to share information, knowledge and culture. While it can be seen that there are some points of criticism with regards to the regional legislation for copyright protection in the Andean Community, it is a great leap towards the harmonization of a legal and institutional framework, attributing to constitutionalization and the concept of embedded liberalism, as it has at its heart the consideration of social developments and the needs of its people. Most importantly, it is necessary to understand that neither countries nor their legislation can be understood in isolation from international and regional frameworks. However, these structures could potentially provide a benefit if they were to be replicated in developing country regions around the world and it is therefore all the more important to understand how and to what extent national legislation is shaped by them.

[62] At this point it is essential to note, that there are extensive provisions for entrepreneurial rights under the community legislation, there are also some balances established between them and the priorities of member states in regards to social developments and security. This is particularly evident from the establishment of binding minimum exceptions and limitations which should be carried through into national law by every member state. "Study on the Implementation of the TRIPS Agreement by Developing Countries", Phil Thorpe, Commission on Intellectual Property Rights

European Union: Copyright Protection

- ***1993 Directive***

In addition to TRIPS, there are Directives which influence the national legislation of all EU member states, including in the UK. One of the most important (for the purposes of this study) is the 1993 Directive on the harmonization of the term of protection of copyright works[63]. In its preamble, this Directive made reference to the provisions of the Berne and Paris Conventions as well as the GATT Agreement, which demonstrates the international context in which these regional frameworks are set. The motivation for this Directive was expressed as the reasoning that "...in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community…".

Article 1 makes the initial provisions for the duration of author's rights in literary and artistic works as the lifetime of the author plus an additional 70 years after his death; this is said to be irrespective of the date when they were made available to the public. *Article 2* in turn makes it clear that cinematographic or audio-visual works are protected for 70 years after the death of the last surviving person, listed in this article (i.e. principal director, author of dialog and the composer of music). Related Rights are considered in *Article 3* and establish their duration of protection as 50 years from the date of their performance. Other important provisions are contained in *Article 4* (protection of previously unpublished works), *Article 5* (Critical and scientific publications), *Article 6* (Protection of photography), *Article 7* (Third country Vis-a-vis protection), *Article 9* (Moral Rights), *Article 10* (Application in time) and *Article 13* (General Provisions).

- ***2001 Directive***

Essential Provisions

[63] Council Directive 93/98/EEC, 29 October 1993, harmonizing the term of protection of copyright and certain related rights

Another directive which has influenced the European community approach greatly is the 2001 Directive[64], otherwise known as the INFOSOC Directive. Again, the preamble of this Directive gives an insight into the motivation and underlying aims of this provision. One of the first explanations that is given is that a high level of intellectual property protection is desirable as it will lead to high investment in creativity and innovation. Reference is also made to the continuing development of technology and that therefore "the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation". On the other hand, it is also made clear that harmonisation of the relevant legal provisions is essential, since several member states have already enacted legislation in order to respond to technological challenges and this might lead to significant differences in protection which in turn will affect the free movement of services and products.

Explicit reference was made to the WIPO Conference which was held in 1996 and concerned the adoption of the 'WIPO Copyright Treaty' and 'WIPO Performances and Phonograms Treaty'. In this context, it was clarified that this Directive also aims to implement a number of these new international obligations. It is also interesting that further direct reference was made to the moral rights of a rights holder and that these remain outside the scope of this directive and instead should continue to be exercised through the provision of the Berne Convention and the above mentioned WIPO Treaties.

Sanctions and Remedies

The requirement that_member states shall make provisions for protection against the circumvention of technological measures which aim to protect the work is contained in *Article 6,* while *Article 7* provides for protection against anyone removing or altering electronic rights management information and against the making available or communication to the public of works. *Article 8* makes it clear that each member state shall make provisions for adequate sanctions and remedies

[64] Directive 2001/29/EC of the European Parliament and of the Council, of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society

in response to an infringement of the obligations of intellectual property. Amendments to the previous Directives which are necessary for the correct operation of the provisions contained in this one[65]. The provision of regional copyright legislation on its own would not be of much benefit if there was no possibility of enforcement of these provisions. There is liberty for member states to implement measures in an individual manner, however the regional courts and institutions also oversee that this liberty is employed in a way which is in accordance to regional regulations and legal safeguards[66]. The more legal regulations and their enforcement through institutions based on a harmonized legal and institutional foundation, the more predictable and stable the market becomes[67].

Exceptions and Limitations

When moving on to the main body of the Directive, there are some articles which ought to be considered. *Article 2* for example makes provisions for the right to authorise or prohibit the temporary or permanent reproduction of an author's work, by the rights holder. *Article 4* also makes provisions for the protection of the distribution rights. *Article 5* in turn contains the previous mentioned list of exceptions which MAY be granted by member states, in particular *Section 2* of this Article lists exceptions to reproduction rights; these include exceptions for private/non-commercial use, for libraries, educational establishments or archives as well as reproductions of broadcasts made by their own broadcasting company. *Section 3* extends this list to exceptions such as the use of the work for illustration in teaching or scientific research, reproduction in press and quotations as well as public security and for help to disabled persons. The only exception for which member states are obliged to make provisions is that of transient or accidental inclusion in the legal use of a work.

[65] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, it can be found on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

[66] Refer to the explanations contained in chapter 3 on the importance of institutions as well as the explanation of the role of the regional institutions in this chapter.

[67] See statements made in "Economic Analysis of Prescriptive Jurisdiction and Choice of Law", Joel P. Trachtman, 2001

In relation to the provision of an exhaustive list of exceptions and limitations to reproduction and communication rights, contained within this Directive, it was remarked that "this list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market"[68]. In further reference to the issue of exceptions, it was stated that, upon their application, rights holders should receive fair compensation. This illustrates a similar background for harmonization as in the TRIPS Agreement and places the regional framework in relationship with the wider international legal sphere, particularly in relation to the protection of entrepreneurial rights, the main aim of which can be identified as providing a common framework that facilitates the operation and success of the regional market. What is also evident from the above statements is the awareness of the detrimental impact which a gap in protection and harmonisation would have across the regional organizations. Concern for the regional coverage of copyright protection is not, however, mirrored by an equal concern for the negative impact that a lack of regional harmonisation of exceptions has on the utilization of and access to copyrighted works. The one sided concern towards increased protectionism is understandable in relation to the national and regional importance of the creative industries, yet a balance between these economic interests and social needs can only be obtained if (at least some of) the users' interests are also safeguarded at a regional level.

- ***2006 Directive***

Another important change was made at regional level by the 2006 Directive, which is focused particularly on the protection of copyright and specific related rights[69]. At the onset, it was made clear that the main aim once again was the harmonisation of provisions for the unimpeded operation of the internal market. Under this consideration, focus was placed on the term of protection established by the Berne Convention as being 50

[68] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

[69] The full text of the Directive 2006/116/EC can be found on http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429198579812&uri=CELEX:32006L0116

years after the death of the author; this is considered as no longer being sufficient since the average lifespan within the community has increased and these 50 years no longer cover two generations. Therefore, this should be extended to 70 years after the death of the author or the lawful publication of the work or 50 years for related works. Further, it is made clear that member states may provide for an exception of payment of damages from a person who exploited the works in good faith, when these works were in the public domain. In relation to a previously unpublished work being lawfully communicated to the public for the first time then the person who published such work will be granted a protection comparable to the entrepreneurial rights of an author for a period of 25 years from such publication. Scientific publications are considered in *Article 5* where it is made clear that once these works come into the public domain they are protected for 30 years from that publication.

- ***Amendments to the 2006 Directive***

The Directive has been subject to recent changes; Article 1 has been modified and now establishes that musical compositions are to be protected for 70 years from the latest death of the people involved in the making of the work. In relation to phonograms, it was made clear that if the producer fails to make the copies of the work available to the public within 50 years of it first being communicated to the public, then the public may access it and the performer may terminate the contract with which he transferred the rights. Another important clarification was made in relation to Article 1(7), since this is set to apply to musical compositions which are protected in at least one of the member states. Further, it was made clear that the member states should communicate to the Commission the main provisions of their national law which aim to implement the Directive[70].

What can be seen from these Directives is there is a strong emphasis on the harmonization of the authors' rights, which is much more specific then the provisions contained in TRIPS and links back to the establishment of previous binding agreements such as the Berne Convention. In addition, it should be noted that the provisions for

[70] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights

exceptions and limitations are left to the member states which causes a rather one sided harmonisation, which although providing stability and predictability to the copyright based industries, does not entail a regional balance of economic and social concerns. Intellectual property protection has in the past and continues to throw up issues within the EU as well as at the international level. It is a difficult balance for the EU between the wishes of the different member states and the line of international opinion, as well as the new technological state. Therefore, it was stated that "It is widely accepted that Copyright as a law will never be fully complete, and can only ever exist as a continually evolving law, adapting to the new challenges that face it, and the governments that create the legislation"[71].

Some of the similarities between the EU and CAN are no longer so surprising when one considers the long history of collaboration that exists between them. The first stage of this cooperation took place between 1973 and 1982 and its main focus was the promotion of development in a variety of areas, for example agricultural development and energy cooperation. The second round ran between 1983 and 1992 and the emphasis shifted to matters of trade and economic cooperation. The third phase lasted up to 2003 and the related cooperation agreement now highlighted the union of political and social development. It is considered that cooperation between these two regional unions "has contributed to the strengthening of the Andean integration and therefore to peace and to economic and social development of the region[72] ". Another example of this support is that the European Commission approved the Regional Cooperation Strategy with CAN for the four year period between 2002 and 2006. This included an indicative amount of 29million Euros and, under the Cooperation Strategy which spanned from 2007 until 2013, a further 50million Euros have been set aside as a tool for the development cooperation[73], which were used to

[71] "The History of Copyright", 23 April 2002, can be found at: http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/The%20History%20of%20Copyright.htm, last accessed 10/05/2014

[72] Andean - European cooperation, http://www.comunidadandina.org/Cooperacion_canue.aspx , last accessed 26/10/2012

[73] European Commission, Andean Community, Regional Strategy Paper 2007-2013

finance projects in the area of disaster prevention, trade-related technical assistance, statistics, civil society and the fight against drugs. These exemplify the specific areas of interest in which cooperation is both needed and willingly provided, they provide a rather wide scope yet the focus is clearly on economic and social development. The fact that technical assistance is limited to trade related aspects might indicate that the benefits of this cooperation are hoped to return to the EU through increased and beneficial trade with the CAN partners.

Chapter Conclusions

The importance that regional organizations have for shaping the legal framework of their members but also the opportunity they have to provide more balance within this system, has been illustrated in this chapter. Although regional organizations have more institutional powers and their members are bound by common goals and closely connected interests, the utilization of these benefits cannot always be observed. Member countries are essentially free to implement the regional legal framework how they see fit and particularly the provisions concerning exceptions and limitations, essential to support social developments, are not converted into obligations. In the context of embedded liberalism and its understanding of linking economic and non-economic principles, it can be seen that harmonization is one sided, while harmonisation of other areas would clearly be in the interest of global citizens and a “balanced” system, as it would provide stability and predictability not only to the interest of some, but also accommodate universally the needs of others[74]. The clear differences and similarities evident from the regional legislation explained above highlights that harmonisation does neither necessarily mean the word for word copying of laws, nor their application and understanding. It is clear from this chapter that legislative harmonization employed on a regional level leads to some benefits such as increased facility of trade relationships, legal predictability and ability to balance the rights in line with

[74] International institutionalization is aimed at provisions the means for the continued evolution and enforcement of the legislative provisions; this can be observed well within regional provisions and has been looked at in the previous chapter.

particular needs and aims. In a variety of the above statements, declarations and agreements it can be seen that it is essential for countries to balance their economic developments with social needs, within their legislative and institutional frameworks, this is particularly evident in relation to the Andean Community and Ecuador. The EU has outgrown its primarily economic focus in the many decades since it was first established. The growing legislation and concern for social issues and stability has filtered through in many areas of community law. While there is an awareness of the importance of access to knowledge and culture contained in copyrighted goods, this has to date not been reflected in establishing harmonised obligations for a balance of interests. While the EU has demonstrated that it is apt to create legislation and enforce such through its institutions, copyright balance has not yet been part of this.

The institutional framework is essential for both regional organisations in order to enable them to support and enforce their policy goals and legal provisions. However, although there are similarities in their institutional structure and also in some of the copyright legislation established, these regional organizations also exhibit different sets of preferences. As a union between several developing nations, the Andean Community has a set of diverse difficulties and aims that incorporate many social issues on the road to not only securing economic growth. In general, the European Union also promotes social aspects, but in relation to copyright protection, it is geared more towards the creative industries and the economic market. The emphasis on regional copyright balance is therefore different dependent on the needs and preferences of the member states and in turn, these regional laws play an important role in the way in which they are implemented and interpreted in the national context. The following chapters will take a look at how national law reflects regional directions and preferences in order to illuminate this complex relationship further.

Chapter 5

Law and Policy in Ecuador

This chapter will illustrate the changes that have been made in Ecuadorean copyright legislation in recent history. This will nurture an understanding of what impact TRIPS has had on the national legislation and if changes were implemented in order to reach this international standard or if this was already done at an earlier stage. It is important to remember that TRIPS provisions do not operate in isolation and that regional and bilateral agreements also play their role in harmonizing copyright protection across nations. Therefore, the wider view in relation to the development of national legislation will give an indication of the importance of TRIPS for Ecuador. Focus will also be drawn to the legislation currently in force and specific points of it in relation to the question of balance posed previously. The structure which will be employed for this chapter is to first look at the development of national legislation and policy over the past few decades, secondly, to summarise the present legislation and thirdly, to draw conclusions from these observations based on the considerations of institutionalization, embedded liberalism and proportionality in rights balancing.

Development of Legislation

- ***Ecuador in the Andean Community***

In order to understand the regional context, in which Ecuador's national laws operate, it is important to understand the role it plays within the regional organization. Therefore, an example of Ecuador's point of view on the community should be taken into consideration. The following paragraph refers to a speech which was made by Ecuador's President Rafael Correa in 2008, when he was the president of the Andean

Community[1]. This point in time was not only marked by strong tensions between the community members due to different opinions as to economic and social strategy, but it was also set in political tensions, during which time two member states cut all diplomatic relations with each other[2]. At the onset of this speech, he remarked on the basic principles of mutual respect in order to continue forward with the integration despite the different economic visions and approaches. Correa stated that this meeting was an opportunity to seek permanent solutions for these issues so as to enable the member countries to return to growth based on the aspects that unite them, "that which we can do better together, than separately". This strong emphasis on unity between the member countries is again emphasised when he calls for CAN to be an "area of coexistence for development", in which priority is granted to the community institutions. The continued integration should be considered a tool for governance and sustainable development, which revolves around the shared interests of the member states and their people. In relation to this, Rafael Correa said that "although it may sound paradoxical: at last, the Andean peoples have been integrated into the Andean Community", due to the meeting of the Consulting Council of the Indigenous Peoples and the continued integration of Afro-Latin American peoples. These statements illustrate the recognition of the importance of unity and a strong cooperation between the member states as well as the importance of the community institutions and legislation in order to move forwards with economic and social developments in the region.

The above example clearly shows that Ecuador strives towards the strengthening of the union between the Andean member countries and Correa also identifies the integration of the citizens and the increased development of integration in economic sectors, specifically mentioning the protection of intellectual property. The closing remark of this speech takes into consideration the crises that heavily impacted the "so-called First

[1] Speech given by Rafael Correa in 2008, transcript can be found at;http://www.comunidadandina.org/ingles/press/speeches/correa14-10-08.htm

[2] Ecuador and Colombia entered into diplomatic difficulties after an unannounced mission of Colombian armed forces on Ecuadorian territory took place in order to strike against the Colombian terrorist movement FARC. For more information see for example: “The Crisis in the Andes: Ecuador, Colombia, and Venezuela”, Ray Walser, 2008, The Heritage Foundation

World"; he says it is essential for the Andean Community and its countries to "move ahead on our own two feet[3] " for which the continued integration of peoples and nations is essential. With this statement, the importance placed on regional integration rather than on outside reliance is made crystal clear. Ecuador's approach can certainly be seen as one strengthening the principles, evolution and objectives of the Andean Community as a whole. What can be deduced from the above statements is that these do not just represent a temporary preference or opinion, but rather a long term commitment towards regional integration on several levels, similar to that of the European Union, which also may not be free of conflict and differences of opinion but has grown over the past few decades.

The specific economic importance of copyright related industries for Ecuador can be seen from the report of the Latin American and Caribbean Economic System. It exported 23 million USD worth of creative goods in 2002 and 47million USD worth in 2008[4]. This can be translated to an annual growth in this industry of 9.3%. In comparison; Colombia had total exports of goods and services derived from creative industries in the same years of 374 million USD with an annual growth of 20%, Peru had total exports of 124 million USD with a growth rate of 13.6%, Bolivia's total exports came to 71 million USD with an annual rate of 4.2%. In this context, it is clear that Ecuador's creative industries are continually gaining in importance and that the annual growth rate in the Andean Community as a whole is extremely high. The importance and reliance on this sector of the economy is therefore not to be underestimated, which makes it all the more essential to have adequate legislative provisions for its protection but also balancing ones that take into account issues such as high levels of illiteracy in some national regions as well as cultural diversity.

- ***International Influence on Legislative Changes***

[3] Speech by the President of Ecuador, Rafael Correa, at the Meeting of the Andean Council of Presidents, Guayaquil, October 14, 2008, and can be found at http://www.comunidadandina.org/ingles/press/speeches/correa14-10-08.htm

[4] “Incentivo a las Industrias Culturales y Creativas en América Latina y el Caribe”, Latin American and Caribbean Economic System, 2011.

In relation to the international setting, the provisions contained in Article 163 of the constitution are important as this states "the rules contained in international treaties and conventions, once published in the Official Gazette, shall be part of the law of the Republic and take precedence over laws and other regulations of lower rank"[5]. This makes it clear that the international legal framework is of vital importance to the national legislation in terms of uniform implementation and application of protection rights.

The influence of international law can be observed early on from the Washington Convention on Copyright from 1946. Regional Organizations already were recognized as providing benefits and stability through a more detailed cooperation and harmonization in the legal and institutional level. The inalienability of the author's moral rights were recognized for the first time in South America in this treaty as well as it was the first to use the word 'copyright'. This Convention was the first transnational agreement on the issue of IP protection in Latin America and marked a great step for many of the contracting parties, including Ecuador. It was stated that, as a country, Ecuador found "it was easier to access this type of agreement at the continental level and under the premise that the American Convention on Copyright in Literary, Scientific and Artistic strengthens reciprocal protection Inter-American copyright, and also helps the exchange cultural development of the continent"[6].

The Legislative Decree from November 1956 and Executive Decree No. 476 from December of the same year, establish, under the influence of the UNESCO, Ecuador's access to the Convention on Universal Copyright from 1952. These regulations were later incorporated into the Copyright Law from 1976. The purpose of this convention was stated to be to "harmonize existing legislation, whatever their level"[7]. There was a strong focus on harmonization quite early on; with this, the convention essentially

[5] A summary which looks at detail at different international obligations that Ecuador entered into through time can be found at: "Los nuevos desafíos de los derechos de autor en Ecuador", Marco Rodriguez, 2007

[6] "Los nuevos desafíos de los derechos de autor en Ecuador", Marco Rodríguez, page 33

[7] Preamble of the Convention on Universal Copyright from 1952

abolishes any thought of raising the level of protection steadily[8]. However, it must be remembered that there are certain regulations in place which give the possibility to adapt to a new system through transitional provisions and a longer period of implementation, particularly to developing countries.

In the 1950's legislation, reference is made to the Berne Convention and especially Articles i and iv. Yet, formally the Berne Convention has just relatively recently been incorporated into the legal provisions which govern copyright protection in Ecuador, namely in 1992. This has been attributed to a combination of missing political willingness, disinterest and missing knowledge of copyright in general as well as the difficulties which Ecuador faces in relation to economic, political, social and cultural development[9]. In Article i of the Berne Convention for example, it states that "The contracting states undertake to adopt all the necessary provisions to ensure adequate protection and effective rights of authors, or any other holders of these rights ..." In response to these provisions, the national legislation of 1976 distinguished between author (natural person) and derivative holder (legal entity exercising copyright) and rights granted to both. Many provisions can be seen that comply with this, such as the term for protection and the explicit protection of economic and moral rights. Other important international provisions which also had to be implemented in Ecuadorean legislation are for example Article IV of the Berne convention which states that besides making provisions for reasonable exceptions, it also states that the contracting states "should provide a reasonable level of protection of effective individual rights that are subject to those exceptions". Social priorities, as equilibrium measures, are not strongly supported in this earlier legislation as much of the focus is on the establishment and protection of creators' rights.

The Rome Convention does not interfere with copyright protection for literary and artistic works, so as not to cause confusion in these fields of international legislation. Further, the Rome Convention grants the power to national legislation to make provisions for exceptions for the circumstances

[8] This understanding is also evident from articles like the one from M. Rodriguez referenced above.

[9] "Los nuevos desafíos de los derechos de autor en Ecuador", Marco Rodriguez, 2007 page 18

of private use, fragments, fixation of broadcasting organizations for use in their own programmes, teaching and research purposes, in whichever mode is reasonably fit[10]. These exceptions are not obligatory; member states are therefore free to choose how and if they want to implement them. In addition, the provision of these exceptions might also require some adjustments for the countries' enforcement procedures. This makes it difficult to observe a balancing agenda within these provisions as the economic rights protection is a great deal more developed. What can be seen from the previous paragraph is the development of economic protections and the adaptation of the national framework in line with a variety of different international conventions and agreements, including the TRIPS agreement.

An important example of the situation prior to when the main reforms were made to intellectual property legislation can be seen in a case brought forward in 1964[11]. This case concerned the protection granted to works of jewellery, which were registered and awarded a certificate of protection, as was the law at this point in time. The initial starting point was that, if the law requires registration in order to award the legal rights, then these are granted with such an inscription. This was in accordance with Article 31 of the Intellectual Property Act. However, it was also made clear that it is a well-established principle that the ownership of the connected rights can be invalidated if evidence contrary to the inscription is presented, this is contained in Article 30 of the same law. The plaintiff based her action on the certificates of registration of her work; however, these inscriptions had lapsed. The plaintiff of this case was the intellectual author and owner of goldsmith works and the defendant sold reproductions of these works. While the plaintiff requested an injunction and damages against the defendant for the sale of these reproductions, the defendant in turn also wanted damages against the plaintiff for fraudulently registering intellectual property in the designs which existed "since long ago in the country and was sold freely" .

[10] Article 15of the Rome Convention, full text version can be found at http://www.wipo.int/treaties/en/text.jsp?file_id=289757

[11] Judicial Gazette, Series 10. No. 7, Page 2745, Quito, November 20, 1964

The court of first instance placed importance on the provisions contained in Article 30 and Article 12 of the 1959 Act[12], which establish that the author is considered to be that person whose name appears on the registration deed and who is duly verified by the creation of the work in the entries in the General Register of Intellectual Property. However, later, the Supreme court came to the conclusion that it was not possible to properly verify the author of the works in question since no one could formally object to the registration of rights because of the Ministry's failure to publish the required register and therefore evidence to the contrary should be accepted under consideration of Articles 30 and 12 of the law. Additional weight was placed upon the statement of the Legal Advisor of the Ministry of Education and the report submitted by a member of the House of Ecuadorian Culture which states that "The House of Culture will oppose the granting of the Registry Intellectual Property registrations based on the use of indigenous art motifs because they belong to the national heritage and can be used with absolute freedom, for all Ecuadorians as they have done in the course of centuries". On the basis of these points, the court revoked the prior judgement in favour of the defendant's appeal and the plaintiff had to pay costs and compensation of damages.

This case clearly illustrates that the situation with regards to the registration of intellectual property and the granting of connected rights derived from such registration was problematic. This might be one of the motivations for the subsequent changes in law, to the effect that registration is no longer necessary and that the rights exist from the moment of creation onwards. Several other interesting points can be noted, such as the importance of justification for the defendant's arguments based on free accessibility of cultural heritage; although expressed in different ways, this can be found in many jurisdictions. This is important evidence for the fact that economic rights were not considered superior to certain social and cultural rights. Further, the importance which was awarded by the court to the position of the Cultural House, as a contributory factor, is rather intriguing, as this clearly shows the policy considerations which have to be

[12] The Intellectual Property Law, encoded by the Legislative Commission on November 25, 1959

taken into account as well as the access and free use of national heritage for the Ecuadorian population.

The court clearly had to balance the economic protection awarded to the creator against those rights of accessibility of cultural heritage to the wider population. Even if the court made no express reference to the concept of proportionality, the application of it in relation to the balancing of rights can be seen clearly in the final reasoning and judgement. The importance of balancing rights, between economic progress and social needs, not only being established in legal texts is paramount. Rather these also need to be considered in the application and interpretation by courts. If provisions are available in theory but are not taken into consideration in practice, the framework as a whole could not be called operational. In order to achieve this, more equilibrium between the different interests in copyright, legislative and judicial practice need to go hand in hand, exemplifying the close intersection of embedded liberalist compromise, institutionalisation and rights balancing.

Another example of the court's approach, prior to the major changes in the legislation, can be seen in a case from 1975[13]. The issue is brought before the court of third instance and reference is made to the fact that the lower courts had reached a conclusion in favour of the plaintiff. The plaintiff was the author and owner of an artwork referred to as "The House of the Colony" which consisted of twenty pen drawings. According to the law at this point, the plaintiff had registered the intellectual property in these drawings. The defendant, on the other hand, who owned a pottery shop, had been making reproductions of these works for about eight years, without having authorization to do so. It was therefore considered that the defendant had violated Article 620 of the Civil Code as well as subparagraphs g) and i) of Article 33 of the Copyright Act, by making these unauthorized reproductions of the artwork.

In order to resolve the appeal, it was made clear that Article 620 of the Civil Code provides that "the productions of talent or wit are property of their authors" and that the ownership of property which arises from an idea (Intellectual Property) that is embodied in the creation of a scientific, literary

[13] Gaceta Judicial, Series 12, No. 11. Page 2307, Quito, October 30, 1975

or artistic work "is governed by special laws"[14]. The then valid law provided under Article 25 that "the exercise of the rights inherent in intellectual property, authors must register the title of his work with the other details that are essential to identify it", a certificate of such effect was presented by the plaintiff, while the defendant argued that, back in 1967, he entered into negotiations in order to obtain an exception of prescription for his work.

Additional importance was placed upon the wording of Article 43 of the 1959 Copyright Act which made it clear that "actions from the violation of this Act shall lapse after two years of the offense committed, if not already initiated prosecution, or, otherwise, after two years of having started". However, the court emphasized that the wording of "having started" is to be understood not in the sense of the initiation of action but the action on procedural development. An interpretation to the contrary would have the effect that the parties would be victims of "delays in the judicial proceedings such as of defective or late performance of judges and this cannot be… The judiciary has to meet their specific purpose, not avoiding the application of the law, unless perhaps referring to what may be their responsibility with regard to the delay in the clearance and disposal of cases". The term will be counted from then on and will operate in the explained form.

Other points were also considered such as the inalienable rights which are established under Article 11 of this law provided there is no evidence to the contrary under Article 3. It was further established that the plaintiff sold the defendant the right to reproduce five of his drawings in 1967. The plaintiff was within his rights to sell these drawings in order for them to be reproduced on pottery and therefore he lost his right to claim authorship of the work. Based on the previous analysis, the court concluded that the plaintiff's intention was to allow the defendant to use his works, therefore the payment of damages was awarded to him.

[14] "The Intellectual Property Law, encoded by the Legislative Commission on November 25, 1959, and Constant Coding of the "Constitution and laws of the Republic", 1202 Supplement to Official Gazette of August 20, 1960, has been preceded by the Copyright Act issued by the National Congress on October 24, 1957, published in Official Gazette No. 435 of February 11, 1958 and the Law on "Literary and Artistic Property," issued on August 8, 1887, published in the Official Gazette "El Nacional" - Official Register now - number 277 of August 22, 1887"

Specific reference was made by the court to the international context of these provisions and their interpretation by stating that; "this right, in general, either to authorize or to prevent reproduction, has been widely recognized internationally and through the various legislation by the Berne Convention of September 9, 1866. and, especially, by the Inter-American Convention on copyright in literary, scientific and artistic approved in Washington on June 22, 1946 …the same therefore also constitutes Republic Act, in which Article II Convention determines that the copyright "includes the exclusive right to have the author of a literary, scientific and artistic: use and authorize the use of it, in whole or in part, have the right to any title, wholly or partially, and pass through death " being able to reproduce them in any form, in whole or in part (literal g) and Article XI "the author of any work protected by having their copyright by sale, assignment or otherwise, retains the right to claim authorship of the work and to object to any modification or use of it to be harmful to his reputation as an author, unless by prior consent, contemporary or subsequent to such modification has transferred or waive this right in accordance with the provisions of the law of the State in which the contract is concluded" Once again this shows the respect of international legislation and simultaneously highlights the continued need for the internationally binding treaties to be revised and modified with the consideration of a wider variety of copyright needs and approaches of the member states. The mirroring implementation of international provisions into national legislation also illustrates its contributory function in terms of constitutionalization and institutionalization, as it spreads principles and interpretations of copyright among member states.

- ***The 1976 Copyright Legislation***

The *Copyright Act of 1976*[15] was published in the Official Gazette No.149 which repealed previous legislation (from 1959) on the issue of copyright for a more extensive version of the regulations and a formal incorporation of the UCC and Rome Convention. The 1976 Act focuses on the protection of the author. An important point of the 1970s' legislation is the extent of the recognition of protection not only to Ecuadorian nationals, but regardless of the country of origin of the work nor the nationality or

[15] Full text can be found at www.cit.org.ec/files/RO-No.-149-del-13-08-1976.pdf last accessed 24/09/2014

domicile of the author or rights holder. Additionally, the 70s' Act set out principles of the immediate protection of copyright, without the need for any registration or formality for the recognition of the associated rights. Further, this legislation established the Ecuadorian Institute of Intellectual Property as the main organisation in relation to the management of the rights. Even at this point in time national institutions were entrusted with the responsibility of overseeing and, to some extent, guiding enforcement, which shows the recognized importance of supportive institutions.

Further, the national legislation provided that the protection of a copyright work is independent of the material form of the work. The reformed legislation made an addition for cinematographic and audio-visual works, as well as graphs and geographic maps, applied art, topography and general science, photography and computer programs. The protection has also extended the list of works of art and architectural works and provided more alternatives in relation to adaptations, translations and other transformations of the originally protected work. In relation to the economic rights, the provisions contained in the 1976 Act include rights such as the exploitation of exclusive rights of the work or the rights of importation of works or copies. The 1976 Act also contained two additional moral rights which were subsequently removed; the right to publish, modify and finish the authors own work or to authorize others, as well the withdrawing of its work from the employer, even after authorizing the use of the work previously.

The original period of protection was fixed as 50 years after the author's death in the 1976 Act, which means that the current legislation extends this provision by a further 20 years, which is beyond the requirements from the Andean Community and the TRIPS Agreement. In relation to neighbouring rights, the term of protection was changed from 25 years to 70 years, as counted from the 1st of January of the year following the one of performance or fixation, respectively provided for under the 1976 and the current legislation.

In addition to the exceptions provided under the earlier legislation, the exception for the reproduction of daily news, reproduction of a single copy in a library, ephemeral recordings, reproduction or communication of a work for judicial acts and for the parody of a work have been added. What

can be seen from these provisions is an early and strong emphasis on the protection of the creator's works and rights. The balancing provisions in the form of exceptions and limitations are contained in increasing numbers. This shows that Ecuador had already implemented international standards of protection prior to its accession to the WTO and TRPS, while it also made growing provisions for balancing of the system.

Current Legislation

- ***General Provisions for Copyright Protection***

Currently in Ecuador there is only one act which encompasses the provisions for copyright protection as well as industrial property protection[16]. Under *Article 1* it is established that the state recognises, regulates and guarantees intellectual property which has been acquired in accordance with this law, the decisions of the Andean Community Commission and the applicable international conventions. Further, it establishes what is considered to be included in the word "intellectual property". The rights under this Act apply without prejudice to domestic and foreign domiciled (*Article 2*). The Ecuadorian Institute of Intellectual Property (IEPI) is the administrative organism entrusted with the promotion and protection of the intellectual property rights recognised by this law on behalf of Ecuador as well as international treaties and conventions[17].

The essential provisions for the protection of copyright start with *Article 4*, which provides that the rights of authors and other rights holders are recognized and guaranteed. Copyright protection is acquired from the moment of its creation, regardless of its merit, destination, and mode of expression and country of origin of the work or nationality of the author as well as without the need for registration[18]. *Article 6* in turn makes it clear that copyright is independent and compatible with the property in which the work might be embodied. The essential attributes of copyright protection are contained in *Article 8*, which also contains a non-exhaustive list of works which are protected and *Article 9* protects derivative works if they

[16] Ley de Propiedad Intelectual, Codificación No. 2006-013

[17] As established under Article 3 of the current legislation.

[18] This is contained in Article 5 of the Ecuadorian copyright law.

contain characteristics of originality. *Article 10,* on the other hand, makes it clear that the form of expression through which the author transmits his idea is protected, but that neither ideas nor methods are protected. What is evident from these general principles is that they are, for the most part, mirrors of internationally recognised standards of protection and can be found in a comparable form in many national legislation, such as in the UK and Chile. A notable difference, however, is the protection of nationals and foreigners alike and also the explicit and repeated attribution of legislative origin to the provisions of the Andean community and international treaties. This exemplifies a strong awareness of the regional and international role of collaboration, exchange and protection on copyright related issues.

A case which considers the interpretation of essential principles of copyright protection[19] in more recent times will be illustrated now. Here, the plaintiff was appointed as an insurance broker for the provincial institutions and he prepared the groundwork for the legal contest insurance policies as instructed. Then, he was informed that he would be transferred to another firm and the work which he had done was subsequently used for the publishing of tenders. Therefore, the court had to consider whether the work done by the plaintiff fulfilled the characteristics referred to in the legislation in order for it to be protected by law. At the outset of this case, the court made it clear that the legislation provides that the protection is awarded on the basis on human talent; in this, content specific reference was made to Article 7 and 8[20]. Article 7 establishes that there are three characteristics to this principle of protection; "The purpose of guardianship must be the result of man's creative talent, protection by the guardianship recognized regardless of the gender of the work, its form of expression merit or purpose, and that which is essential, that is product of human ingenuity protected by the law shall be characteristic sine qua non, originality". This was interpreted by the court as requiring human creation to

[19] Expediente de Casación 189 Registro Oficial 645 de 21-ago-2002

[20] The Art 8., The Copyright Act provides that: "The protection of copyright lies with all intellectual works in the literary or artistic, whatever their genre, form of expression, merit or purpose. Rights recognized by this title are independent of the ownership of the material object in which the work is embodied enjoyment or exercise and are not subject to the registration requirement or the fulfilment of any other formality ... ".

contain sufficient unique features, which distinguish it clearly from other works, in order to deserve legal protection.

Insurance contracts, are not entirely free to the wills of the parties, but are subject to procedures and rules set out by the Superintendence of Banks and Insurance. The preparatory work can therefore be understood as choosing between several available options, which cannot be considered an original intellectual creation. Therefore, the court concluded that the work of the plaintiff cannot be protected by law. It was further explained that therefore literary works which are based on the total or partial replication or mechanical application of knowledge or ideas of others cannot be awarded protection. Yet, this was relativized in relation to Article 9 of the Act, which provided for the protection of derivative works if they contain characteristics of originality, such as translations or revisions, but Article 10 further makes it clear that laws, regulations and court decisions and public opinions are not protectable.

This case is a great example of the court's interpretation of fundamental principles of copyright law, namely originality and the author of a work. It should also be remembered that the revised legislation, as amended in 2006, provides under Article 16 that work created in the course of employment is considered to be property of the employer. Considerations to this effect cannot be seen in the present case, but it is quite clear that since the case was dismissed on the fundamental principle of originality, this additional aspect was not explored[21].

In *Article 11* it is explained that only a natural person can be considered to be the author of a work, while judicial persons can be considered to be the rights holders. It further provides that in order to determine the rights holder, it has to be seen whether the law of the country of origin of the work conforms with the criteria laid out in the Berne Convention and Paris Convention. In relation to works made for hire, non-

[21] Article 16. - Unless otherwise agreed or subject to special disposition contained in this book, the ownership of works created in relation to labour dependency corresponded to the employer, who is authorized to exercise the moral rights for the exploitation of the work.
In the works created on commission, ownership corresponds non-exclusively to the principal, so that the author retains the right to exploit them differently than contemplated in the contract, provided that this does not constitute unfair competition.

exclusive rights correspond to the principal, the author therefore retains the right to exploit them in any other manner except that covered under the contract, as long as there is no unfair competition resulting. The next important provision is contained in *Article 17*, which makes provisions for the resolution of rights holder references in relation to anonymous works.

Another case which considers the principles of copyright protection and the potential balancing of these with exceptions by the courts, arose out of the request for a substantial analysis of the laws in relation to original documents which were in the possession of a University and the copy of the defendant's thesis[22]. In considering the matter, the court first made it clear that for an appeal to be properly carried through, it is necessary for the party requesting it to determine the misapplication which it thought to have occurred. Further, it was made clear that that Articles 1, 2, 5, 8, 18, 20, 281a and 291 of the Intellectual Property Law ensure the exploitation of the copyrights by the rights holder while prohibiting their use by those without authorization to do so, yet "at trial, to achieve the desired results one does not only have to state the legal rules underlying the claim, but must also demonstrate by proof on both the rights and that it has acted as the actual violation of individual rights".

Again, specific importance was placed on Article 7 of the legislation which provides that an author is to be considered the person that creates the intellectual property and Article 11 reinforces this principle by establishing that only a natural person can be considered the author of a work, while judicial persons can only own the copyright in accordance with the legislation. The court therefore considered that only individuals can claim the rights exclusively conferred upon the author and further reference is made to Article 19 as well as to Article 20 which both relate to the author's rights. In the opinion of the court, this did not constitute a contradiction to the provisions contained in Article 15 which provides that; subject to agreements to the contrary, the legal person who has organized, coordinated or directed the work shall be considered the owner of the copyright and can therefore exploit the moral and economic rights on behalf of it.

[22] Expediente de Casación 71 Registro Oficial 366 de 29-jun-2004

On the basis of this legislation, the court stated that it was evident that the university is merely the copyright holder and can therefore not exercise the rights granted exclusively to the author. In addition, the defendant reproduced only part of the work and clearly identified the source. In order for an action to be considered plagiarism, two conditions need to be fulfilled; first, that the works are reproduced by a person different from the author and secondly, that this person pretends such to be his own work. Therefore, the appeal was denied. This case illustrates once again the importance placed by the courts on the interpretation of fundamental principles of protection, such as what rights are granted and whether the acts under its consideration amount to an infringement. The court also made it clear at the onset that the burden of proof essentially lies with the plaintiff, who has to demonstrate that rights exist and that these were violated. This also demonstrates an understanding of having to provide for possibilities of defence and balance within the copyright framework.

- ***Moral and Entrepreneurial Rights***

The next section of this legislation establishes at first instance the regulations in relation to moral rights. *Article 18* makes it clear that the rights to claim authorship, keep the work unpublished, objection to defamation or alteration and the right to access a unique or rare copy owned by third party are un-renounceable, inalienable, indefeasible and un-transferable rights conferred upon the author. Further, it is made clear, in the Ecuadorean law, under *Article 18* that any violation of these rights give rise to compensation for damages, while also establishing that, upon death, the exercise of these rights passes to the successors who may exercise these rights for a period of 70 years after the author's death.

From *Article 19 to Article 27* the economic rights of the author are explained. These include among others the exclusive right to exploit his work in such a way as to derive a profit from it. This includes the reproduction, communication to the public, distribution, importation and adaptation of the work created by him. The protection of economic rights can under no circumstance be underestimated, since the remuneration that an author or rights holder receives is the basis of future works and developments. Therefore, the approach of the national courts is a vital indication of not only current protection, but also the understanding of

underlying reasons and justification for its existence, while also giving an indication as to how these are balanced against the social priorities and preferences that might be of concern.

A great example of the working of Articles 19 and 20 can be seen in a case which has been discussed before and related to the copy of the defendant's thesis which was held by the University[23]. The court made it clear that only a natural person can claim the rights reserved to the author, for this reasoning, the court relied on Article 19, specifically the part of this provision which makes it clear that "the author has the exclusive right to exploit his work in any form and to derive profit there-from, within the limits established in this book, " and under Article 20 this specifically related to the reproduction of the author's work. Further, any doubts that this was going against the provisions of Article 15 were put out of the way, by the court's explanation that this referred to the right of a legal person to exploit the economic and moral rights of the work only subject to contrary provisions.

Another example of the court's position in relation to the protection of economic rights can be seen in a case that was decided in 2007 and centred on the reproduction of various CDs[24]. It illustrates the economic interests underlying copyright protection. The plaintiff took action against a letter which he received from the Executive Director of the ENRUCOPI, requesting him to pay remuneration for the private copying of more than 3million CDs, based on the argument that such payment would cause imminent harm to him as collective value would cause his insolvency. This action relied on the Constitution of Ecuador which has supremacy over any other law, statute or regulation. On the other hand, it was stated that IEPI did not violate any constitutional provisions, as the action taken does in no way cause imminent harm to the plaintiff but instead aims for the enforcement of a resolution passed by the IEPI Board. The resolution is a legislative measure that targets manufacturers, importers as individuals or companies who provide the public with media capable of incorporating sound or audio-visual recordings or reproduction apparatus to this effect

[23] Expediente de Casación 71 Registro Oficial 366 de 29-jun-2004

[24] Resolución del Tribunal Constitucional 270 Registro Oficial Suplemento 188, 10-oct-2007

and is not directed at any natural or legal person in particular. What can be seen in this case is the significant role that national collecting societies also play, not only in bringing these cases forward and arguing on behalf of the creators, but it also illustrates the role that institutions such as IEPI have within the national legal framework of protection.

It was made clear by the court that unrestricted access to reproduced works of any form causes detriment to the authors and producers because it changes the normal mode of operation of works and therefore entitles them to compensation. It is therefore understood that remuneration for private copying appears to be the only solution to restore a legal system in which the author is able to contribute to the community. While the plaintiff argued that his constitutional rights were violated, the court considered that IEPI regulated the norms of Intellectual Property Law within the duties attributed to it. Through this, it can be seen how the court not only protects the author's rights, but also strives to uphold the national institutional dimension. This is also a particularly relevant consideration in the court's assessment of the rights which are protected by law, as well as individuals and institutions and requires the court to balance these against each other in some form. Since the excessive focus on economic rights' protection would be just as detrimental as not awarding enough protection. The protection of economic rights is an important asset of a balanced legal structure, since it enables the recognition of merit, recompenses for costs and provides some incentive. Therefore, courts as well as the legislator need to establish sufficient provisions for the protection of both sides of interest in copyright law.

The remainder of the articles, up to *Article 25*, mainly have the purpose of clarifying what is meant and included in the rights established previously. In *Articles 25 to Article 27* provisions are made for the permission of the copyright holder to apply appropriate technical protections in order to prevent the infringement of his rights. *Article 26* clarifies among others which acts are considered infringements to the prescribed economic rights and *Article 27* provides for the possibility of transferring any or all of the economic rights. It further states that "The alienation of the material does not imply any assignment or authorization with respect to copyright in the work embodied. It validates the transfer of

exploitation rights in future works, particularly if they are identified or their gender, but in this case the contract shall not last more than five years." [25]

The aspect of the duration of copyright is discussed in *Articles 80 and 81*. *Article 80* provides that works are protected for the lifetime of the author plus 70 years and that in the case of collaboration, the additional period should be calculated from the death of the last co-author. Further provisions are included for the circumstances of posthumous, anonymous and collective works.

- ***Protection of Related and Neighbouring Rights***

The provisions for related rights are contained in *Articles 85 to 108*, and cover the special situations of interpretations and performances of protected works. *Articles 85 and 86* contain general regulations in regards to the neighbouring rights to copyright protection. *Article 88,* on the other hand, provides for the performer's right to authorize or prohibit communication to the public of their live performances as well as the fixation of their work and its reproduction by any means. *Article 91* provides that the duration of protection will be for 70 years counting from the 1st January of the year following that in which the interpretation, execution or fixation occurred. The next paragraph focuses on the neighbouring rights applicable to the producers of phonograms. The provision of an exclusive licence by the producer is regulated in *Article 93* of this legislation, while the *Article 94* continues to provide that the producer has the exclusive right to carry out, authorize or prohibit public communication. *Articles 95 and 96* regulate the situation of common management companies and also the duration of the protection. Broadcasting organizations are considered in *Articles 97 to 101*; here it is established for example that these organizations have the exclusive right to carry out, authorize or prohibit the retransmission of their broadcasts and the fixation or reproduction of these, this includes even a single image if it becomes available to the public for

[25] Section five in turn considers the special provisions for certain works. Computer Programs are considered in *Articles 28 to Article 32*. Specific provisions are for Audio-visual Works are contained in *Articles 33 to 35* of this legislative provision. Architectural works in turn are considered in *Article 36*. In the *Articles 37 to Article 43* regulations are contained for the protection of works of art. The following *Articles 44 – 79* look at the different forms of contracts for the use of works, including broadcasting and advertising contracts.

the first time through the broadcast. Payment for private copying is considered in *Article 105*. In Article 105 it is stated that the private copying of a work fixed on phonograms or videogames and reproduction of printed literary works are subject to remuneration[26]. In *Article 108* it is made clear what is to be understood as private copying and that such copying done on media players or other equipment without the payment of the compensatory remuneration is a violation of both the copyright and neighbouring rights.

- ***Limitations and Exceptions***

It is important for national legislation to take into account not only the potential economic benefits but also social detriments that can occur form the way in which copyright protection is enacted and enforced. Particularly for states, such as Ecuador, who face a number of social concerns and needs, Ruggie's statement that "the core principle of embedded liberalism is the need to legitimize international markets by reconciling them to social values and shared institutional practices[27]" is true. The national framework has to some extent legitimized the power granted to rights holders with the establishment of adequate and necessary exceptions and limitation as a counter-balance. An unbalanced system causes detriment to the society. Otherwise, either the creation of new works is undervalued and under protected or, on the other hand, access to such works is restricted in such a manner that no benefit can be drawn from their existence. The adequate incorporation of exceptions and limitations ensures that those who have legitimate interests and justification to access protected works are granted such use. *Article 83* makes it clear that, at the end of the established term of protection, the work passes on to the public domain and therefore may be used by anyone, with the remaining respect for the moral rights attached. Further, this Article provides an exclusive list of acts which do not require the authorization or remuneration of the rights holder, " a) The inclusion in a work of fragments of another, …provided that the works have already been disclosed and they are included by way of appointment or for analysis, comment or critical

[26] The *Article 107* has been modified by the Fifth reformatory Disposition, The *Article 107* has been modified by the Fifth reformatory Disposition, Fifth reformatory Disposition, no. 3 of the Act s / n, RO 544-S, 9-III-2009

[27] Please see explanations contained in chapter 2 and "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Ruggie, 2009

assessment. Such utilization may only be made for teaching or investigation, to the extent justified by the purpose of this incorporation and the identification of the source and the name of the author of the work used;

b) The execution of musical works at official events of state institutions or religious ceremonies, …provided that participants in the communication not in receipt of remuneration specified by its intervention in the act;

c) The reproduction, distribution and publication of articles and comments on current events and collective interest …;

d) The dissemination by the press or broadcasting of informational lectures, speeches and similar works disclosed at assemblies, public meetings and public debates on matters of general interest;

e) The reproduction of news of the day or different facts having the character of mere items of press information…;

f) The reproduction, communication and distribution of works that are permanently in public places through photography, painting, drawing or any other audio-visual form… and that purpose is strictly the diffusion of art, science and culture;

g) The reproduction of a single copy of a work is in the permanent collection of libraries and archives, with the sole purpose of replacing …;

h) The ephemeral recordings that are destroyed immediately after its broadcast;

i) The reproduction or communication of a work disclosed for judicial or administrative use;

j) The parody of a disclosed work, which does not carry the risk of confusion with, nor cause damage to the work or reputation of the author, or performer, …,

k) lessons and lectures at universities, …schools and education and training in general, which may be entered and collected by those to whom they are intended for personal use". These exceptions and limitations are rather extensive and specific and illustrate the importance placed upon concerns of access and social developments by Ecuador. The aims explored in the previous chapter in relation to Ecuador’s expressed concern

for social stability and development, might be an explanation of why this country felt the need to make considerable use of the freedom provided under Article 13 of TRIPS which leaves member states open to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder".

An important aspect of the provided exceptions is therefore the connected provision of conditions for their utilization. The most important conditions that can be found in this context are the identification of the original author or source and exploitation without the receipt of monetary gains from it. It is also important to remember that some of the exceptions incorporated into Ecuador's legislation are specifically required under the regional laws of the Andean Community, for example provisions for exceptions for libraries and teaching. Apart from the legislative provisions of exceptions and limitations, it is essential to see if and how these are interpreted and applied in practice by the courts, since words needs to be followed by actions in order to create a more balanced copyright system. If exceptions and limitations are available in theory, but are not actually carried forward in the daily evaluation and balancing of rights by the courts, no balance in the sense of embedded liberalism can be achieved.

In this context, reference can be made once more to the case of the documents held by the University[28] which shows how there is potential for application of exceptions by the Ecuadorian courts and once more highlights the institutional function of the courts to balance and resolve potentially conflicting rights and interests. The court made it clear that it used legal principles to underpin its decisions and that, based on this, there was no violation in the work produced by the university officials. Crucially for this point of the analysis, the court made it clear that the defendant only reproduced a minor part of the document in question, while also making sure that he identified the source, therefore falling under the exception mentioned under Article 83(a). Further, it was clarified by the court that in order for there to be a violation of the author's copyright two conditions need to be met; the first is that the work has to be reproduced by someone other than the author, the second condition is that this person pretends this

[28] Expediente de Casación 71 Registro Oficial 366 de 29-jun-2004

work to be his own. Since the defendant did not fulfil the second requirement given that he acknowledged the actual author, the appeal was denied on that basis. What can be seen from this legislative provision and the case is that Ecuador has included the main exceptions and limitations available under international and regional law. While TRIPS provides the freedom for countries to establish exceptions, the binding provisions established by the Andean Community, in order to promote a balanced as well as a harmonized system across its member states, is exemplary of how regional legislation can be used to benefit both competing interest groups inherent in copyright law.

- ***Collecting Societies***

The next part of this legislation is concerned with the management of collective action. The definition of a collecting society is contained in *Article 109*, as a non-profit organization whose purpose is the collective management of economic and neighbouring rights and the affiliation of owner of copyright or related rights is voluntary. *Article 110*, on the other hand, provides that the collecting societies are obliged to administer the rights entrusted to them and they are authorized to exercise the terms provided in their constitutions, the mandates and contracts which have been entered into with foreign entities. This does not impair the ability of the rights holders to exercise their rights. The need for a single collection society per genre of work is contained in *Article 111*.

The issue of precautionary measures for the protection of intellectual property against copyright piracy was considered in a case in 2009[29], which also demonstrates the importance and inter-connection that institutions and collecting societies have within the copyright framework. This action was proposed by the National Editors Company (ENSA) before the Administrative Court against the Director General of Legal Guardianship and Management of the IEPI. The practice which lay at the basis of the case is that during a diligent inspection, appointed officials were allowed to issue interim measures without jurisdiction to do so. The power to order injunctions is reserved for the ordinary courts. The plaintiff's claimed

[29] Constitutional Court Resolution 544, Supplement to Official Gazette 127 of 15 June 2009

against the precautionary measures ordered by IEPI officials, through which it was possible to prohibit the marketing and publishing of magazines which are branded as "You Mama".

This action was brought about by the simultaneous occurrence of an unlawful act or omission by a public authority, that this act violates or may violate any right under the Constitution, international convention or treaty in force, the act or omission so imminently threatens to cause serious injury. In order to establish whether an offence took place, the court states that " an act is illegitimate when it has been issued by an authority not competent to do so, has not been issued with the procedures outlined previously by law or whose content is contrary to the legal effect or that it issued without sufficient grounds or reasons, in such, the analysis of the contested measure". Particular emphasis is added to Articles 333, 335 and 336, which regulates the authorities and regulations that are attributed to IEPI, these include that it has the right ex officio or upon request to inspect, supervise and sanction of actual or potential violations of intellectual property rights. As well as this specific provisions are made for the inspections and the conduct of precautionary measures and the confidentiality of related information. case shows how the courts use their capabilities to oversee the correct conduct of other national institutions, while also provision an example that this function is an integral part of the operation of the national legal framework and through this the respect and implementation of the international legal system.

Another case in which these principles can be observed once again, revolved around the function of SAYCE. The case was decided in 2009[30]. This case demonstrates the fact that collecting societies are an important entity which helps the creator's rights to be protected, through the process of bringing actions before the courts in their benefit. Here, the General Society of Ecuadorian Authors and Composers (SAYCE) brought a case forward against the Stone Brothers Cardoso as licensees of the radio station "94.9 Super FM". Another example can be seen in the case of CD piracy[31] referred to earlier. This case makes extensive reference to both the

[30] Resolución de la Corte Constitucional 4, Registro Oficial Suplemento 651 de 7 de Agosto del 2009, Caso No. 0004-09-CN

[31] Resolución del Tribunal Constitucional 270 Registro Oficial Suplemento 188, 10-oct-2007

working of the IEPI as well as the ENRUCOPI. Specifically it was made clear that the IEPI aims for the enforcement of internal and external resolutions, which shape the approach to manufacturers as well as importers. In addition, it is important to recognize that the function that collection societies have in supporting creators and helping them to enforce their legitimate interests in cases of violation is essential, since it ensures that even authors who do not receive excessive amounts of remuneration for their works are supported. Otherwise, only those creators who have sufficient funds would be able to uphold their rights and those are the ones that probably least need to do so. The redistributive function that collection societies exert in this manner supports creators but also helps the economic and social development of the country.

- ***Enforcement of Intellectual Property Rights***

The general principles for the protection and enforcement of Intellectual Property Rights are contained in *Articles 288 to 292*. The enforcement and interpretation of rights as well as exceptions is essential to the functioning of a system and particularly to the question of balancing economic and social rights through the interpretation and implementation of national rights, which also reflect international and regional obligations[32], by the national courts and institutions. Among others, these Articles provide a list of the actions which can be taken in relation to the infringement of rights, such as the cessation of the violation, confiscation of products or other objects and total value of costs. An important provision is contained in *Article 292*, as it contains regulations for the circumstance of violations trough digital communication networks; here the operator and other legal persons in control will be jointly liable. The persons referred to under this Act are exempt from liability for acts or technical measures which are taken to prevent the occurrence or continuance of an infraction.

The process of legal action before the courts is contained in the next section of this legislative Act, *Article 294*[33], provides that, in the first

[32] For instance Article 289 makes it clear that international required rights under conventions are also applicable, specifically under the Agreement of Trade-Related Intellectual Property Rights (TRIPS).

[33] as amended by the Reform Disposition fifth, No. 1, of Law s / n, RO 544-S, 9-III-2009

instance, judges of the administrative litigation are responsible for the knowledge of the controversies on the subject, while on appeal, this shall be passed to the court specializing in this area in the respective provincial court. Specifically, the appeals which result from the provisions of this Act, will be known to the Chamber of Administrative Litigation of the National Court of Justice. Further provisions are contained in *Article 304*, as it establishes the additional fine in relation to the total value of the copies of works, performances and broadcasts or the royalties applicable. Provisional and precautionary in relation to the process against IP infringement are detailed in *Article 305 to 318*, for example these also include the immediate cessation of the unlawful activity may include the suspension of the infringing activity as well as any measures necessary for the urgent protection of the infringed right.

From *Article 319* onwards, the provisions for criminal responses and penalties are contained. The further provisions of the next Articles are concerned with more specific penalties in relation to trademarks and other industrial property protection. In turn *Article 324* considers punishment in relation to violations of copyright and related rights, in the case of the alteration or mutilation, public communication, importation, reproduction or sale of the work, imprisonment of three months to three years and a fine of up to thirteen thousand USD. Aggravated circumstances are concerned in *Article 327.* These include for example the offender receiving a warning about the violation of the law or that the infringing products potentially cause damage to health. In *Article 330*[34] it is established that the judge of a respective case may order the forfeiture of all objects used directly or indirectly in the commission of the offence. What is evident from these specific provisions is that Ecuador's national legislation incorporates a standard of copyright protection which is not merely focused on the granting of rights but also considers necessary issues in relation to their being enforceable and balanced through legal regulations and institutions.

- ***Perspective of the World Trade Organization on Ecuador's Copyright Protection***

[34] as amended by the Fifth reformatory Disposition, no. 3 of the Act s / n, RO 544-S, 9-III-2009

The World Trade Organization[35] undertook an analysis of the TRIPS provisions in Ecuador. In the second paragraph of its report, it stated that the Ecuadorian government has made a considerable effort to harmonize its legislation since 1997. The Constitution itself recognizes and guarantees the protection of IP rights, to the extent to which they are enacted in the IP Law, procedural and criminal legislation and relevant Andean Community Decisions. It was remarked that, especially the enactment of the 1998 Legislation, resulted out of a long internal debate. Yet it was considered that it establishes a genuine code for protection and important issues in relation to all fields of IP. It is also recognized that a wide protection is granted in response to multilateral, regional and sub-regional agreements and in addition, provisions are made for administrative procedures and criminal penalties, in order to enhance legal certainty and encourage intellectual creativity. In due course, questions from Japan and the EU were brought forward and in relation to a notification which will be submitted to the Secretariat in this context.

The first question of the EU was made in relation to the retroactive protection provided for phonograms and performers, as in accordance with Articles 9, 14 and 70 of the TRIPS Agreement. It was clarified that Article 5 of Ecuadorian Law provides that copyright is protected by the mere fact of the existence of the work and independent of its merit or mode of expression, that moral rights are inalienable and are only transferred by the death of the author, as in accordance with Article 18 and that the patrimonial rights last for the lifetime of the author plus 70 years, before passing into the public domain. All of these provisions apply equally to works which have been created prior to the enactment of the legislation, under the condition that they have not yet entered into the public domain, in consideration of the time-limits of the Law.

The second question refers to the protection awarded to the compilations of data in accordance with Article 10 of the TRIPS Agreement. The answer was made in reference to Article 8 of the IP Law of Ecuador, as it provides for the copyright protection of all works in the literary and artistic fields, which also refers to compilations and databases. Further reference

[35] Council for Trade-Related Aspects of Intellectual Property Rights Original: Spanish Review of Legislation Ecuador, 10 May 1999

was made to Article 28 of the Law and its regulations in respect of computer programs and whether these should be considered as literary works, independently of their storage in a computer or other form of their expression in source or object code. Additional reference is made to the Andean Community contained in Decision 351 of the Commission of the Cartagena Agreement, particularly Articles 4 and 23, which provide for the protection of anthologies and compilations of various works and databases. These explanations highlight once again the stable ground of protection awarded at a national level, while also demonstrating the benefit and support gained through the establishment of a regional framework. This benefit is derived due to regional organisations facilitating the implementation of international standards through more detailed provisions that are increasingly tailored towards the member states' particular concerns and preferences.

The following questions were tabled by Japan, the first of which centred around the protection for works, phonograms and performances as well as the provisions for the general exceptions and exceptions to the most-favoured-nation treatment as permitted under Articles 3 and 4 of the TRIPS Agreement. In response to this question, it was explained that the relevant protections are contained in Articles 5, 20, 8 - 91 and 92-96 of the Intellectual Property Law from 1998. In addition, Decision 351 of the Commission of the Cartagena Agreement from 1993 also provides for the protection of works, phonograms and performances in Articles 4, 11, 13, 34-36 and in Articles 3 and 4 of the TRIPS Agreement. Once again, it is important to note the great influence that regional legislation has had in relation to Ecuador's provision with an additional foundation for the protection of copyrighted works. This indicates that international, regional and national laws all co-exist in a tandem relationship, providing different layers of protection and legal frameworks which countries and individuals can rely on.

Japan's second question was about the protection of computer programs, for both source and object code. There are provisions made for the protection of computer programs under Article 8k of the Act as well as under Articles 28-32, which provides for the protection of computer programs as literary works. The third question refers to the patentability of subject matter, while the next question further requests explanation of the

provisions in relation to patent infringements. The fifth question from Japan looks at the remedies which the judicial authorities grant in response to infringements of copyright and industrial property protection. Under Article 308 of the Intellectual Property Law, provisions are made to prevent an infringement of any of the respective rights, provisional or precautionary measures which can be ordered and also to order any other necessary measures which help to prevent the violation of rights. Further reference was made to Article 309 of the 1998 Act which establishes the possibility for an immediate cessation of the unlawful activity.

The following questions centre around the damages and penalties which can be granted in response to an infringement and whether these are adequate to the detriment suffered by the author of the work. In response to these doubts, reference was made to Articles 289, 303 and 320 of the Intellectual Property Law. For example, the damages may include the profits earned by the infringer, as well as the potential profits of the owner and the reasonable costs or the remuneration or royalty that would have been payable and also the total value of the procedural costs which might be payable. The consistency of the civil and criminal procedures with the regulations contained in Articles 45 and 61 of TRIPS was explicitly remarked upon[36].

Adequate remedies are an essential feature of a reliable and stable legal framework for copyright protection. In order for a system to be balanced it requires remedies and damages which are in accordance with the rights but are also proportional to the infringement and the specific situation. The balancing of rights on a legislative as well as on a judicial level is essential in order to safeguard both legitimate rights protection and legitimate access or utilization. At the same time, the possibility to enforce such remedies in the case of infringement becomes increasingly difficult the more we move away from the national provisions. At a regional level, it might still be possible for an individual to seek such enforcement, while international procedures are more a matter of nation vs nation. Therefore, the approach and interpretation taken by the national legislation and courts are of vital importance if international copyright protection is to work for the

[36] Response to questions 8 and 9 to the questions made by Japan

individuals directly affected by it. The reliance of TRIPS on the implementation and interpretation of regional and national courts in order for its principles to be carried forward and enforced is only one aspect. On the other hand, these binding principles could be interpreted with the need for embedded liberalist principles and the increased incorporation of social considerations to benefit the countries that implement them, particularly those with only a relatively recent history of copyright protection and international collaboration, such as Ecuador.

Andean Community cases highlight important principles

It is important to consider the approach taken by the Andean Community Court since this sets the tone for interpretations across the member states. Ecuador is subject to the decisions of the legislative bodies of this regional agreement, which leads to a common approach that is secured in relation to intellectual property as well as the establishment of common guidelines. The Andean Court of Justice established that community law takes precedence over any national law which conflicts with it.

The Andean Community Court's approach to copyright protection can be observed well in a case submitted to it by Ecuador in 2010[37]. The essence of this case was the need for judicial interpretation of Article 4 literal h) and k) of Decision 351 of the Cartagena Agreement. The court also provided interpretations of Articles 1, 10, 11b), 13, 15,18 and 57 of the same Decision. The original circumstances of this case come from the Property and Services Manager of MERCED INSER with the public exhibition of his works in various offices of the La Merced Cooperation. These works were reproduced, copied and misused as well as used without his authorisation. During the analysis of the facts, the Andean court stated that it is important to note that "the author, ie. the individual who performed the authorship (Article 3), is the original owner of property rights in the work, and it is presumed that the author, unless proven otherwise, is the person who is named, pseudonym or identifying mark appears in the work concerned (Article 8). This does not mean that a person or entity other than

[37] Process 97-IP-2010

the author may possess the ownership of economic rights in the work, in accordance with the regime contemplate the domestic legislation of Member Countries (Article 9) "and that" the ownership of the work is exercised through a bundle of rights and morally exclusive. Such rights conferred by Decision 351, are independent of the ownership of the material that is incorporated in the work (Article 6)"[38].

In addition, reference was also made to what exactly is protected in relationship to the work and the 'authorship' is the way how the author chooses to be known, therefore it will protect the real name, pseudonym or anonymity, in accordance with the will of the author of the work. In relation to this, reference is made to Article 8 of the Decision which states that "it is the presumed author, unless proven otherwise, the person whose pseudonym or other identifying mark is visibly shown in the work"[39].

Considering the moral rights which were granted, the Andean court made reference to a prior decision in which it stated that "Moral rights protect the author correlation work based on the intellectual and spiritual interests of the author regarding his work. Article 11 of Decision 351 embodies the characteristics of moral rights: indefeasible, imprescriptible and inalienable"[40]. In this case, reference is also made to paragraph two of Article 11 of Decision 351 as, although it is not expressly stated, the moral rights in regard to their nature are limited in time and upon the death of the author they continue to the head of his successors and later their defence is the responsibility of the state and other designated institutions which are created for the purpose of protecting the paternity and integrity of the work. Further, the court said that the power can be positive or negative (defensive). The first encompasses all the actions that the copyright holder can do with the work, for example, the ability to disclose the work, modify and remove it (literally to Article 11 of Decision 351). The latter are all those

[38] Process 165-IP-2004, published in the GOAC No. 1195 of May 11, 2005

[39] preliminary interpretations 10-IP-2007, judgment of 4 December 2007, Case: Violation of Copyright

[40] Process: 110-IP-2007

actions taken to defend the authorship (paragraphs b and c of Article 11 of Decision 351)"[41].

The regional court also held that, with regard to economic rights in works created in the course of a commission or employment, "the Decision distinguishes between the original ownership and the derivative as well as attributes of the exercise of such rights in accordance with relevant national legislation, unless proven otherwise (Article 10)[42]". In a prior process, it was stated that in the case of works created in the course of employment, the Community provisions referred to treatment of ownership and exercise of the corresponding economic rights, by the nature or legal persons, and the relevant national laws[43]. In theory, it was stated that "creation is a personal act and although the author used must comply with its obligations related to employment and even receive instructions regarding the gender of the work or the general characteristics of the same, the form of expression is proper and therefore no one can deprive him of his status as creator"[44]. Further, the court stated that there is a difference between a work which has been created by the employee without the use of resources from the employer and a work which relies upon these resources. In the second circumstance, when the completed work is connected to normal labour tasks, then the employee does not have moral rights to the work. In addition, attention was also paid to the difference between a work created through a collaboration and a collective work. A work in collaboration is "created jointly by two or more people working together, or at least taking each other into account in their contributions under a common inspiration"[45]. The regulation provides that, if there are no provisions to the contrary, then the rights of the collective work belong to the person who edited and published it.

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[41] Pre-judicial Interpretation 10-IP-2007, judgment of 4 December 2007, Case: Copyright Violation

[42]"Derecho de autor y derechos conexos", Delia Lipszyc, Ediciones Unesco-Cerlalc-Zavalia, 1993, p.126

[43] Process 165-IP-2004, published in the GOAC No. 1195 of May 11, 2005

[44] “Estudios de derecho de autor y derechos afines”, Ricardo Parilli Antequera, 2007, Reus, page 40

[45] Delia Lypszyc cited by Ricardo Parilli Antequera, cited above on. page 36

The last point which was remarked upon by the court in relation to the effect of the employment relationship of the work created was that Decision 351 establishes that the ownership of economic rights and their exercise is governed by the individual laws of each of the individual member states' legislation. Some of the jurisdictions have provided that this point will be governed by the provisions contained in the contract, and in the absence of a written contract, it is to be assumed that the economic rights have been granted non-exclusively to the employer, in the extent necessary for their ordinary use and with the authorization to disclose it.

Among others, reference was also made to Article 15 as it establishes what is meant by public communication, while also making clear what is meant by the concept of transmission and what is included within it, among others, the transmission of works to the public by wire, public display of art works or public access to computer databases by telecommunication. Further, it is made clear that under Article 57 of Decision 351 and its provisions in relation to the administrative authority which is designated by the national law to challenge a copyright violation. It was also said that "the procedures are subject to the rules of national law under the principle of 'complementarily' between Community law and national law, since the rules were made effective through bodies and internal procedures of the Member Country concerned".

The Andean court made it clear that copyright aims to protect intellectual works and even if it remains unpublished the existence of the work leads to the assumption of the rights attached to it, as long as this work is original. In the case of MERCED INSER, the court finally held that these "measures are provided: payment to the holder of the infringed right of redress or adequate compensation in compensation for damages sustained as a result of the violation of his right to assume that the offender pay the costs of the proceedings in which has caused the owner of the infringed right; the permanent removal from distribution channels of the copies constituting the infringement; or criminal penalties equivalent to those applicable to offenses of a similar magnitude". The Administrative Court should adopt these interpretations when sentencing the internal process in accordance to Andean Community provisions, especially since

Andean and international law takes supremacy over national provisions and interpretations.

What is evident from these specific and guiding interpretations of the Andean court is the importance placed upon adequate protection of the creator's economic but also moral rights to the work. The guiding function as to the application of international and regional provisions can clearly be seen in many explanations made by the regional court, for example in relation to the different situations of copyright in employment or the distinction between positive and defensive rights of protecting the integrity of the work. The importance of the Andean court in providing an understanding of the regional legislative provisions enables the national courts to balance competing rights and interests in a manner which is harmonized across the member countries. This is again, an essential attribute of providing a reliable and firm legislative basis for inter-regional trade and knowledge distribution.

Chapter Conclusions

As can be seen from the above explanation, copyright legislation and the enactment of international obligations in Ecuador have advanced rather rapidly over the last few decades. Important changes were made in the 1970s through legislation, such as the abolition of registration in order for copyright protection to be awarded to a work. It is important to note that many of the changes have already been made in response to the decisions of the Andean Community and that the changes that had to be made in its copyright legislation in response to TRIPS have therefore been rather limited. From this chapter, as well as from others in this project, it can be seen that Ecuador has always placed much of the emphasis on its independence. However, the simultaneous regional integration has resulted in copyright legislation which strives for a balanced system between the competing economic and social interests of copyright.

Moral rights, neighbouring rights and limitations and exceptions, in particular, were already present to some degree before the accession of Ecuador to the WTO and therefore to TRIPS. What can be seen by some of the core sections previously looked at, such as the protection of the author's economic rights and the provisions for exceptions and limitations,

is that the aim for a balanced system of economic rights protection and incorporation of social preferences is not easily achieved.

Apart from the these points of consideration, the examination of the legislation in connection with the case law illustrates the importance that the courts and other national institutions play in the protection and enforcement of the rights and interests of society. As part of this function, courts are often seen to consider and balance conflicting rights and preferences against each other, based on the circumstances of the case and the guidance of the legislation and regional court. The effects of regional integration have to be redistributed through the regional and national legal as well as institutional frameworks, in order for there to be economic growth that is not detrimental but supportive of social developments. In order to achieve this, the promotion and protection of creator's rights is as important as provisions which enable the legitimate access and utilization of works. What can be achieved through regional judicial and legislative guidance is a unified system that takes into account both sides of the coin across member states, in consideration of their particular economic and social preferences. This is demonstrated through this case study of the development of Ecuadorian law, in the context of implementing not only international but much more specific and explicitly balanced regional provisions. In addition, the comparison between this national copyright law with that of Chile and the UK, will further highlight the fact that the impact of TRIPS cannot be understood in isolation from the recent legal and international development of a country.

Chapter 6

Law and Policy in the UK

Development of legislation

- ***The UK in the European Union***

The UK has played an important role in the European Union, right from when it was created. In 1946, the British prime minister of the time, Winston Churchill, called for a "kind of United States of Europe" when giving a speech at the University of Zurich, the objective behind it clearly being improved cooperation between European countries in order to foster a secure and stable environment for economic recovery and growth. A break down in cooperation between the EU and UK in 1951 is exemplified by the President of the Consultative Assembly of the European Council stepping down from his position in order to mark his protest of the UK's indifferent attitude towards the EU[1].

Since then, many developments have taken place in the relationship between the EU and UK[2]. The UK government recently considered its membership in the EU as essential in relation to the national creation of employment, the expansion of trade and the protection of national interests around the world[3]. The economic importance of the Union as a trade and investment partner was also noted, since almost 40% of UK exports are sold to this region, which is part of the reason why the economic crisis has had such an effect. However, it should be observed that the UK economy was hit not just by the EU crisis, but at least equally as hard by the crisis in

[1] An overview over the EUs history can be found at: http://europa.eu/about-eu/eu-history/index_en.htm last accessed 21/10/2012

[2] See for instance "The Copyright Directive – UK Implementation", T.C. Brazell, 2004. Jordan Publishing and "The Europe Dilemma: Britain and the Drama of EU Integration", Rodger Liddle, 2014, I.B.Tauris

[3] Review of the Balance of Competences between the United Kingdom and the European Union, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, July 2012

the US[4]. Regional integration also benefits the alliance between the UK and other member states in relation to universal issues such as climate change, transnational crime, migration and international development. In addition, emphasis was placed on the need for the UK to protect its own economic interests as well, therefore it was seen as vital to not allow the crisis to undermine efforts to decrease the UK deficit as well as taking care that the single market benefits all 27 member states, and therefore also the UK[5]. This exemplifies the great potential and responsibility that regional organizations carry, namely to provide a legal and institutional framework which balances the different interests and preferences of the member states on subject matters against each other, potentially leading to a regionally harmonised framework that is beneficial to trade and supports social stability and development as well.

While the previous paragraph exemplifies a positive and cooperative attitude towards the EU, it cannot be negated that there are continued tensions, especially in relation to the sovereignty of the UK within the legal and institutional framework of the EU. In order to provide the British public with a greater say in what EU policies should be adopted by the UK, the European Act was passed in 2011. In the introduction of the Act, it was made clear that its aim is to "help rebuild trust and reconnect people to these EU decisions". In essence, this act provides that in relation to future EU Treaties which transfer powers from the national government to the EU, the British people must give their consent in a national referendum before this can be agreed. Similarly such consent must also be obtained in relation to a ratchet clause or passerelle[6]. Although this seems like a relatively simple solution in order to grant people increased access and decisive power, one cannot completely refrain from wondering whether the public will always be able to make an informed decision, as this will

[4] Review of the Balance of Competences between the United Kingdom and the European Union, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, July 2012

[5] Review of the Balance of Competences between the United Kingdom and the European Union, above reference

[6] The full text of this Act can be found at http://www.legislation.gov.uk/ukpga/2011/12/contents

depend greatly on access to information from all sides and the explanations they receive prior to the referendum.

Another recent development which indicates the rollercoaster relationship between the UK and EU is the launch of a review into the competences of the EU. This review seeks to analyse the competences, how they are used and the impact they have on national interests, therefore leading to an understanding of what significance the EU membership has for Britain[7]. However, it remains to be seen how well the information can be presented and dispersed among the population, in order to provide everyone with a sound and objective understanding. Other authors have recently attributed the tensions between the UK and Europe to the euro-zone crises on the one hand and British euro-scepticism on the other[8]. In response to the crises, the euro countries would have to integrate further, while the UK is concerned that this might lead non-euro countries to implement rules which they did not decide upon and which lead firms to relocate to the continent. While the situation in general is very complex, the UK has continued to support and participate the developments in the Intellectual Property policy of the EU.

In response to the call for opinions and participation for the EU Green Paper on copyright protection in the digital age, the UK response indicates its position and opinion in relation to EU policy. First, it was made clear that the copyright system is regarded as being essential to the future stability of the creative industries and the economy as a whole. The creative industries in the UK grew by 6% per year on average in the period between 1997 to 2005, which is double the growth of the rest of the economy during this time frame. The amount of employment provided by these creative industries amounted to 1.9 million jobs and here there can be seen a 2% - 4% growth per annum. In relation to the question of EU consultation in particular, it was made clear that the British government thought that the legal framework ought to establish the basis for the relationship between rights holders and users of copyright works. In

[7] “Review of the Balance of Competences between the United Kingdom and the European Union”, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs, July 2012

[8] "Britain, Europe and the City of London: Can the triangle be managed?", Philip Whyte, 12/7/2012

addition, it was stated that guidelines might be used to provide examples of the legal application in practice or to make parties aware of issues which they might seek to avoid. In addition, it could be a tool for making provisions at a faster pace than legislation would be able to, for example in response to rapid changes in technology.

The issue of harmonised copyright exceptions was also considered in this report[9]. Here, the UK stated that there are two opposing camps in relation to the harmonisation of obligatory exceptions to copyright for every member state. One side supports the view that the inconstancy in exceptions across the EU is a stumbling block to a framework which seeks to harmonise the provisions. The supporters of this argue that the practical difficulties on individual national implementation outweigh the benefits attributed to the increased flexibility of the current system and that a mandatory list of exceptions would benefit cooperation and development across the EU. On the other hand, reference is made to the theory that the current system of optional exceptions provides some benefits to the member states, as they are free to take language and cultural aspects into consideration during the implementation, while the Berne three-step test[10] in regards to proportionality and rights balancing must always be applied. The UK government therefore came to the conclusion that it must first analyse whether the harmonisation of exceptions would be possible and what impact it would have on the cultural diversity of different EU countries as well as examining whether it would be logical for rights holders and users[11]. The above examples clearly show the importance that copyright protection has within the UK and in a European context.

[9] Specific explanations are made in relation to a variety of potential areas for exceptions, such as libraries, educational institutions and orphan works. UK Government Response to European Commission's Green Paper - Copyright in the Knowledge Economy, December 2008

[10] This provides that exceptions to the reproduction right might be granted in special cases as long as they do not conflict with the normal exploitation of the work and they do not prejudice the legitimate interests of the author of the original work.

[11] Specific explanations are made in relation to a variety of potential areas for exceptions, such as libraries, educational institutions and orphan works. UK Government Response to European Commission's Green Paper - Copyright in the Knowledge Economy, December 2008

The explicit doubts that are expressed in relation to the utility of regionally binding provisions for exceptions and limitations highlight some form of favouritism towards the creator's interests and the creative industries, which is unsurprising due to their influence upon the economy. The balance and predictability of the regional copyright framework would potentially benefit from the harmonisation of some minimum exceptions and limitations beyond which member states are free to implement others if necessary. However, essential and legitimate access to knowledge and culture should not be limited by national boundaries if the other side of the coin is enjoying the benefits of free trade. Again, at this point it can be argued that the regional market has to legitimise itself to some extent through the recognition and balancing support of social aspects as well as ensure that the economic benefits derived are redistributed across society[12]. Although there are, and have been in the past, disagreements as to the correct approach and policy, the principal objectives are coherent between the EU and UK, especially economic development and stability, which cannot be achieved by disregarding IP protection and international legislation.

- ***Historic Background of UK copyright protection***

This will be a rather brief summary of the major milestones in the legal history of copyright in the UK, since this is a rather complex and extensive area in itself and not sufficient scope can be found to explain it in greater detail as part of this research project. The first statute which formally implemented copyright protection in the UK was the 'Statute of Anne', from 1709. It established that the author of a new book had the exclusive printing right on that book for 14 years. After this period the book could be freely printed. If the authors were still alive after the end of this period, then an extension of another 14 years was given. The motivation of this early Act can clearly be seen in its preamble which states that "Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published books, and other writings, without the consent of the authors or proprietors of such books and writings, to their

[12] Please refer to Chapter 2 for an in-depth explanation of these understandings

very great detriment, and too often to the ruin of them and their families …for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books …".[13] This illustrates the focus on the publishing industry and the protection of the economic rights attached to it as well as the importance of the creative industries even at that relatively early stage in legal history[14] and the provision of adequate remuneration for the creators.

The House of Lords' decision in *Donaldson v Beckett* in 1794 effectively abolished the common copyright law in unpublished works, but it remained in place until 1911. The Copyright Act 1814[15] recognised the increasing importance of authors' rights under Section 4, which provided the author with the exclusive right to print his work for 28 years from the date it was first published yet if the author was still alive than this could be extended for the duration of the rest of his life. The duration of protection was extended once more under the 1842 Act[16], which raised it to the author's life time plus an additional seven years or alternatively 42 years from the date of publication, whichever was longer. Not only was the period of protection extended but different acts were constantly added to the list of protected works. However, in the same year there was passed an act for the encouragement of learning[17]and this illustrates that although extensive protections for the benefit of the copyright industry and creators were made

[13] "The Statute of Anne, 1710", version with transcription available on http://www.copyrighthistory.com/anne.html

[14] "The development of copyright and moral rights in the European legal systems", Simon Newman, European Intellectual Property Review, 2011, page 6 and 8

[15] In relation to this act it has been remarked that "Although it claims to protect authors and to encourage learning, there is no doubt that the London publishers, who had lobbied so hard for it, were the prime beneficiaries..."- in "The History of Copyright", 23 April 2002, can be found at: http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/The%20History%20of%20Copyright.htm, last accessed 10/05/2014

[16] Copyright Act, London 1842, The full text can be found at Primary Sources on Copyright (1450-1900), L. Bently & M. Kretschmer, www.copyrighthistory.org

[17] Bill to amend Acts for the Encouragement of Learning (18 May), London (1814), The full text can be found at Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

early on in the UK legislation, at least some provisions were also passed for the incorporation of social matters into the legislative framework.

In relation to the aforementioned long history of copyright protection, it becomes understandable why it has been stated that "Anglo-Saxon legal systems such as those of the United States and United Kingdom are readier to grant copyright, seen as an essentially economic right, to works that involve labour but minimal creativity"[18]. What can be seen in this brief summary is that there is a long legal tradition in the UK of protecting authors against the detriment of unauthorized use of their works as well as a continuous increase in the rights and durations of protection granted to them. The origin of these rights was mainly motivated by the publishing industries and granted an incentive to authors to continue to create new works. Many changes were made in recent history, particularly in light of international treaties; therefore the next section will take a more detailed look at the evolution of UK copyright in the last century.

- ***The international context and 1933 Legislation***

The first international treaty on the subject of copyright protection was the Berne Convention in 1886, which assured reciprocal protection in all the member states as long as the author is connected with a member state or the work was first published in a member state. Since the United Kingdom was a signatory to this agreement, it had to pass the international Copyright Act in 1886 in order to fulfil its obligations to foreign authors that came out of the Berne Convention and its posterior ratifications. In July 1912, the Copyright Act from 1911 came into force and the major reforms were the abolition of common law Copyright which meant that only the rights which were granted under a statute were valid. In addition, this act made it clear that the rights arise from the moment of creation of the work; therefore it applies to published and unpublished works. A further extension in the period of protection meant that it now rose to the author's lifetime and an additional 50 years. At the same time, the acts which were considered infringements were extended. In relation to the protection for producers of sound recordings, Section 19(1) of this Act awarded them the exclusive

[18]"The development of copyright and moral rights in the European legal systems", Simon Newman, European Intellectual Property Review, 2011, page 1

right to prevent others from reproducing their recordings or playing them in public.

On an international level, the Berne Convention was further revised in 1928 and 1948. The effect of these revisions was the further strengthening of the position of the author in the member states. The 1933 Act awarded protection to the performance of dramatic works as for the first time it gave the exclusive right to public performance for a period of 28 years and this could be extended to the remainder of the author's life. This was further extended by the Copyright Act 1942 which awarded comparable protection to the performance of musical works. It was aimed at bringing the protection offered in line with that granted to literary works, yet posterior legislation was passed with little consideration to a unified system. A report from the royal commission on this subject matter stated that: "the law is wholly destitute in any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no-one who does not give such study to it can expect to understand it". The lack of national uniformity also had an influence internationally as there was the need to secure reciprocal protection from other countries[19].

- ***The 1956 Legislation***

A variety of changes were caused to the Copyright Act 1956 and by the Design Act 1968, which in turn was intended to protect the rights in design drawings for mass produced items. Initial protection against unauthorised recording of music or films was awarded by the Dramatic and Musical Performers Protection Act 1925, yet it only offered very limited sanctions which were further strengthened in the Dramatic and Musical Performers Protection Act 1958, the Performers Protection Act 1963 and the Performers Protection Act 1972. The recording industry complained that none of these provided sufficient protection and this led to the repeal of the Copyright Act 1956[20]. The 1956 Act made it clear that literary works which

[19] The History of Copyright, 23 April 2002, http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/The%20History%20of%20Copyright.htm, last accessed 10/05/2014

[20] The History of Copyright, 23 April 2002, same as the reference number 15

have been published before the 1st of June of the same year had no copyright protection in the UK unless its first publication was in the UK[21]. This was the first legislation which incorporated protection for broadcasts. However, this Act has no retrospective effect and therefore does not apply to radio or TV broadcasts made before 1st July 1957[22]. The duration of protection was set to 50 years from the end of the year in which it was broadcast. Further, this Article provided that copyright in radio broadcasts is not infringed if they are recorded for non-commercial use, it only prohibited such recording if it is not for private use or if a TV broadcast is seen by a paying public. To some extent, this was confirmed by the regulations under the 1988 Act which made it clear that it is legal to make copies of broadcasts for private study[23].

- ***The post 1988 developments and the EU influence***

The changes after the 1988 Act are very important under the consideration of the TRIPS Agreement and the posterior multinational and regional agreements. The period for protection after the author's death was raised to 70 years due to the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297), which implemented the Council Directive No.93/98/EEC, that aimed to harmonise the duration of copyright within all the European Union Member States[24]. Among others, this had the result that if the 1988 Act provided a shorter term of protection than the EU Regulation and the work was still protected on 1st July 1995 in any country within the EEA, then copyright was re-activated.

Particularly in relation to sound recordings, many legislative adjustments were made to the 1988 Act. For example the Copyright (Visually Impaired Persons) Act 2002, provided a particular exception for visually impaired and blind people, which allows for a lawful copy of a literary, dramatic, musical or artistic work, which is in the possession of the person, to be made in order to make it accessible to the visually impaired

[21] The full text of the 1956 Copyright Act can be found at http://www.legislation.gov.uk/ukpga/1956/74/pdfs/ukpga_19560074_en.pdf

[22] Schedule 7 para 17, Copyright Act 1956

[23] Article 29 of the Copyright, Designs and Patents Act 1988

[24]The full text of the Council Directive No. 93/98/EEC can be found at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0098

person. However, the copying of databases is not allowed when copyright would be infringed and in the case of musical works, they cannot be performed to make them accessible. An additional requirement is that the accessible copy should be accompanied by an acknowledgement as well as statements which clarify that it was made under the rules of the above mentioned Act and the exception does not apply if the accessible copies can be obtained commercially. These more recent changes can be understood in connection with the embedding of social principles and priorities. The creation of these particular provisions mark a recognition of the need to facilitate the necessary and legitimate access to works, but the extensive conditions and restrictions placed upon this exception illustrate a certain unwillingness to give more than the absolutely necessary.

Another post 1988 development was the creation of database rights in 1996, previously these were protected as literary works, with the same provisions as are applicable for any other literary works, therefore databases would only be protected if they are an original author's creation. A further development was the extension of moral rights, which also cover performance rights, in 2006. These include the right to be identified and the right to object to any derogation of the performance when it is broadcast or played in public[25]. While the first right is automatic, the second one has to be asserted and their duration period lasts as long as the copyright protection in sound recordings and other performance rights. However, it must be remembered that these provisions are not retrospective and do not apply to any performance before 2006. Their implementation is achieved using secondary legislation of the EU under Section 2(2) of the EC Act 1972, and therefore film performances could not be included in this protection since this would require primary legislation. The artist's resale right was also created in 2006[26] and it was based on the same EU Act from 1972 and their duration is as long as the other copyrights are still valid. This right entitles the artist to a royalty upon sale of his work and this right is neither to be assignable nor waived.

[25] Copyright, Rights in Performances, 2006 No. 18, The Performances (Moral Rights, etc.) Regulations, 2006Article 205C/D and 205 F/G

[26] 2006 No. 346, Intellectual Property Artists, The Artist's Resale Right Regulations 2006

What is evident from the previous section is that there is a long legal tradition of copyright protection in the UK. What started with the Statute of Anne, due to an essential need to protect authors from exploitation and detriment for publishers, has grown into a complex framework that is heavily shaped by the creator's and creative industry's interests. The continuous but step-by-step extension and modification of the legal framework for copyright protection reflect the augmenting importance of the creative industries and authors for the UK. While entrepreneurial rights protect economic interests and provide a monetary incentive, the development of moral rights protects the artistic integrity of the work for the benefit of the author or his heirs. Therefore, the UK's national legislation reflects a particular preference towards the continued safeguard and support of these aspects of the economic market, as they have become increasingly irreplaceable for the UK economy as a whole.

Current Legislation

- ***Essential Provisions***

The main legislative provisions currently in force are contained in the Copyright, Design and Patent Act 1988[27]. In *Articles 1 and to 2* it is explained what copyright is and which rights are attached to it, it makes it clear that " (1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work (a) original literary, dramatic, musical or artistic works, (b) sound recordings, films [or broadcasts] and (c) the typographical arrangement of published editions." In addition to this, the requirements of *Article 153* have to be fulfilled in order for copyright to exist. Some of these conditions must be met by the author while others refer to the country of first publication of the work. In relation to this, it was stated that the person should be a British citizen or be domiciled in a British territory at the material time. On the other hand: "(1) A literary, dramatic, musical or artistic work, a sound recording or film, or the typographical arrangement of a published edition, qualifies for copyright protection if it is first published (a) in the United Kingdom, or (b) in another country to which the relevant provisions of this Part extend".

[27] "Copyright, Designs and Patents Act 1988", Chapter 48, Thomson Reuters (Legal) Limited, UK Statutes Crown Copyright

The following *Articles 3 to 8* look at the kinds of work which are protected under copyright in detail, for example: " "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes (a) a table or compilation [other than a database], (b) a computer program; [(c) preparatory design material for a computer program; [and] [(d) a database;] "dramatic work" includes a work of dance or mime; and "musical work" means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music". However, copyright only exists for these works if they are fixed in some way or another. Sound recordings and films are examined under *Article 5 A and B* as providing a definition of the term, while also specifying that this protection is regardless of the medium of reproduction.

An example of these copyright protections in action can be seen in the case *ZYX v King (1995)*[28]. This case concerned the potential copyright infringements in the song "Please Don't Go". Z re-arranged the song originally written in 1979 and it was recorded by another band. ZYX agreed to distribute the recording in the UK and Germany in 1992. The first three defendants had a copy of the song with Network Records and this was also distributed. In order to establish whether an infringement took place, it had to be considered whether the defendant had actual knowledge or reason to believe that it was an infringing copy. It was concluded that it was obvious by listening to the records that it was an arrangement rather than a cover of the original.

In addition, the court was aware of ZYX's anger at the production of the songs as well as of an injunction granted in Germany in benefit of the plaintiff. The court dismissed the appeal on the basis that the difference was obvious and, if not, then the defendants were deliberately blind to the issue and the previous judge had therefore concluded correctly. It was further made clear that any communication "must be evaluated in the light of all other facts known, so as to amount to obviousness". In addition, it was also held that action can be sought against the defendant in the UK although this had already been done in Germany. In conclusion, the infringement of "copyright was flagrant and it had financially benefited

[28] ZYX Music GmbH v King [1995] FSR 566

substantially from the release of the" second recording. This case highlights the courts' approach to considering the rights of the original author on the one hand and those of the authors of a re-arrangement on the other, taking into account the particular circumstances.

To consider derivative works in this context of copyright protection, *Sawkins v Hyperion Records Ltd (2005)*[29] is a good example. Here, the claimant prepared modern editions of music pieces composed in the 18th century. The defendant's record company did not have the claimant's consent for the production and sale of discs containing the sound recordings of the editions in question. The defendants argued that the claimant had no rights to the music in question and refused to pay him royalties while the claimant contended that he was the author of the original musical works under the criteria of Article 1(1) of the CDPA 1988. The court came to the conclusion that the effort, time and skill required for the creation of the editions in question was sufficient to amount to them being considered 'original' works. This was unchanged by the fact that the claimant had derived his editions from scores of previously existing music. Corresponding to this, it was also made clear that there was nothing in the law to support the argument brought forward by the defendant, that no copyright would exist unless 'new music' was added to the score. The main question was whether S's contribution could count as contributions to the music in circumstances where they did not involve alteration of the notes or melody. The Court of Appeal held that this was possible and Mummery LJ stated that "The sounds may be produced by an organized performance on instruments played from a musical score, through that is not essential for the existence of the music or copyright in it". It was also specified that other element s that contribute to the sound as performed, such as tempo and performance practice indicators, were equally music.

Authorship and ownership of a copyright protected work is looked at in *Articles 9 to 11* and the 'author' is defined as the person who creates it. In the case of sound recordings, it is the producer, for film it is the producer and principal director and, in the case of broadcasts, it is the broadcaster or for typographical arrangements, it is the publisher. The issues of joint

[29] Sawkins v Hyperion Records Ltd [2005] 3 All ER 636

ownership or works of unknown authors are also considered in these Articles. The owner, however, is the natural or legal person that has the first ownership of the rights, but if a work is created by an employee in the course of his employment then the employer is the owner of the work.

A&M Records v Video Collection (1995)[30] should be considered as it also refers to the particular issue of authorship. Here, the plaintiff was employed by ice skating competitors who intended to skate to recordings of two songs and their agent therefore was instructed to find someone to arrange this music into a suitable form. This was done by another person and then recorded by yet someone else. The revised recordings were used during performances, then licenses were granted by the second plaintiff to the first and the performances were filmed by a third party who then licensed the defendant to release the video. The action was based on the assumption that the second plaintiff was the copyright owner and the first plaintiff the exclusive licensee for the sound recordings. This was contested by the defendant who argued that both plaintiffs were licensees. It was explained that the arrangements were made by an agent of the second plaintiff and that it was an implied term that the second plaintiff would own the copyright in the recordings. Among others, particular reference was made to Article 16 and what can be considered copyright infringement in the light of the plaintiffs being the owners. The court concluded that the defendants infringed the copyright in the sound recordings, by not having the adequate authorization from the plaintiffs for the use of the works.

An illustration of what is meant by “employee” can be found in Robin Ray v Classic FM (1998)[31], where the question was whether it was a contract of employment or commissioned work. This case concerned an alleged copyright infringement in several of R's documents which categorized the tracks on C's music recordings as well as a catalogue. Joint authorship was claimed by C based on the fact that R only put into writing words spoken by C or his representatives. The court concluded that joint authorship, in the sense of Article 10 of the CDPA, means that "a significant creative contribution as an author had to be made to the production of the

[30] A&M Records Ltd v. Video Collection International Ltd [1995] EMLR 25

[31] Robin Ray v Classic FM PLC [1998] FSR 622

work which was not distinct from that of the other author with whom there was collaboration. The contribution had to be something which was incorporated into the finished work and protected by copyright". In addition, it was made clear that due to the fact that the idea is not protected but only its form of protection, a joint author has to actually participate in the writing or creation of the work, i.e. having direct responsibility. Therefore "although a small but significant part of the documents reflected the contribution of the representatives, that was insufficient to make C a joint author." The court also laid down the criteria that need to be examined in relation to this issue, namely; control exercised, how many hours, payment, other required works, contributions to health care, responsibility and risks and whether sub-contracting was possible. After taking these into account, the conclusion was that it is a commissioned work with an implied license for the UK.

The different durations of copyright protection depending on the type of work are specified in *Articles 12 to 15*, literary and artistic works are protected for the author's life plus 70 years. In the case of films, these 70 years start from the date of death of the last of the producer, director, author or composer. Sound recordings are protected for 50 years from their year of publication and this is the same period which applies to broadcasts. Typographic arrangements of published editions are protected for 25 years. The stable and strong protection awarded to creators and their works is illustrated in the above provisions and cases and highlights the importance awarded to these interests within the UK framework.

- ***Entrepreneurial Rights and Secondary infringement***

Secondary infringement and acts which are restricted by copyright are considered in *Articles 16 to 27*, which further exemplify the extensive protections granted for the benefit of the creative industries. The copyright owner has the exclusive right to " (a) to copy the work (see section 17); (b) to issue copies of the work to the public (see section 18); [to rent or lend the work to the public (see section 18A);] (c) to perform, show or play the work in public (see section 19); [(d) to communicate the work to the public (see section 20);] (e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21)". An infringing copy and secondary infringement are explained as being "Copyright in a work is

infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright".

Harms v Martans (1927)[32] concerned the performance of music to an audience of members and guests in a Club. The musical play was published in America but not yet in England at that point. The number was performed by an orchestra for an audience of about 130 members and 50 guests. The number of members was limited due to annual re-election but the number of guests was not limited. It was considered by Lord Hanworth whether it was for profit, who was admitted and where it took place; taking all of this into account, the performance was considered public. This case again highlights the strong priority placed by the law on the protection of economic rights and the support of the creative industries for a long period of time.

- ***Moral Rights***

The moral rights of an author are considered in *Articles 77 to 89.* Among others it is stated that one has the right to be identified as the author or director of a copyright protected work. However, this does not apply to computer programs, computer generated works and to the design of a typeface. Further conditions and exceptions are specified in *Articles 78 and 79*. *Article 80* in turn provides for the right of the author to object to a derogatory act or treatment of his work and the following article provides for the exceptions to this, for example it does not apply to reporting of current events and newspaper articles. Another important right is established in relation to the false attribution of a work in *Article 84*; this right would, for example, be infringed by a person who "(a) issues to the public copies of a work of any of those descriptions in or on which there is a false attribution, or (b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution". Article 85 establishes the right to privacy to certain films or photographs, while the remaining Articles of this section consider supplementary issues, such as the duration of the protection and the circumstances of joint authorship.

[32] Harms (Incorporated) Ltd v Martans Club Ltd [1927] 1 Ch 526

When the 1988 Act was formed, it was the first time that the UK had an express provision of moral rights' protection; however, "those who drafted the Act avoided the "purposive" approach, which would have entailed simply restating the general moral rights principles of art.6bis of Berne"[33]. The importance of moral rights can be understood as providing the author with a means of ensuring his and his works' integrity beyond and even without the reliance upon the established economic rights awarded in his benefit.

Sawkins v Hyperion Records Ltd (2005)[34] is a good example of the court's consideration of moral rights. As explained previously, this case concerned the reconstruction of work from the composer, H. made recordings of the resulting music. The particular issues of moral rights were considered by the court with reference to Article 77 of the Act, since this establishes that the author of the work has the right to be identified as such in relation to circumstances also specified. These include the right to be named on copies of sound recordings of his work that are issued to the public. This identification should either be made based on the author's wishes as to a particular form of identification or otherwise any reasonable form can be used. However, the court made it clear that the acknowledgement contained in the CD booklet was insufficient for the purposes of identification and that therefore Article 77 was not complied with. This was considered as being 'hardly surprising' by the court since the defendant asserted that Leland and not the claimant was the sole composer of the music contained on the disc. It was therefore evident that, in the light of the conclusion that the claimant had obtained copyright protection for his work, a related infringement in moral rights was to be found.

Dealings with copyrights are provided for in *Articles 90 to 95*; these include the establishment of licences and the transmission of moral rights after death. Under *Article 90* it is made clear that an assignment of rights is only valid if it is in writing and if the application is limited "(a) to one or more, but not all, of the things the copyright owner has the exclusive right to do; (b) to part, but not the whole, of the period for which the copyright is to

[33] "The development of copyright and moral rights in the European legal systems", Simon Newman, European Intellectual Property Review, 2011, page 8

[34] Sawkins v Hyperion Records Ltd [2005] 3 All ER 636

subsist" and an exclusive licence is defined under *Article 91* as "a licence in writing signed by or on behalf of the copyright owner authorising the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner". *Articles 93 A and B*[35] make provisions for the presumed transfer of the rental rights in film productions and the right to remuneration in connection to the grant of these rental rights. *Articles 94 and 95* state the applicable provisions for the transfer of moral rights, namely that these are generally not transferable and what happens to them upon the death of the author.

- ***Remedies and Penalties for Infringement***

The remedies for infringement are considered in *Article 96 to 115*. These include, among others, that an infringement is only actionable by the copyright owner and that the court should take the circumstances of the infringement into account during their consideration. This represents a clear instruction towards the judiciary for the balancing of rights and the consideration of proportionality when a case is presented before them. Other provisions include, under *Article 97A*[36] , possible injunctions against service providers while *Article 100* makes it clear that the seizure of the infringing works/products may be ordered by the courts and *Articles 101 and 102* make specific provisions for the infringement and remedies of exclusive licences, while *Article 103* regulates the remedies for infringing acts of moral rights. Presumptions for literary, dramatic and musical works, films and sound recordings, are considered under *Articles 104, 105 and 106*. Offences in relation to copyright are considered in *Articles 107 to 112* and it is defined that "A person commits an offence who, without the licence of the copyright owner (a) makes for sale or hire, or (b) imports into the United Kingdom otherwise than for his private and domestic use, (c) possesses in the course of a business with a view to committing any act infringing the copyright, or (d) in the course of a business (i) sells or lets for hire, or (ii) offers or exposes for sale or hire, or (iii) exhibits in public, or (iv)

~~(December 1, 1996)~~

[36] Inserted subject to the savings specified SI 2003/2498 reg.32 by Copyright and Related Rights Regulations 2003/2498 Pt 2 reg.27(1)

distributes, or (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work".

Supplementary regulations are contained in the following Articles; these include the time period after which remedies are no longer available. Copyright licensing is considered in great detail in *Articles 116 to 123*. More specific provisions are made in relation to the licensing by a licensing body are contained in *Article 124 to 134*. Explicit provisions are made for the licensing of copyright in the following Articles up to *Article 144*, including the certification of licensing schemes by the relevant bodies and the circumstances of mergers and competition policies. Under *Article 144A,* the compulsory collective administration of particular rights are established. In these provisions, it can be seen that the essential role that these legislative provisions have is the establishment and insurance of an enforcement structure, as it would be of little good to any legal system to establish rights in their legislation which then cannot be enforced accordingly.

- ***Exceptions and Limitations***

In order to consider the potential for balance in the UK copyright framework, it must be considered which acts are permitted under copyright protection. These are contained in *Articles 28 to 56 of the 1988 Act*. These exceptions and limitations include, for example, the use of copyrighted works by the visually impaired, for educational purposes and in libraries and archives. *Article 31,* for example, provides that the incidental inclusion of a copyright protected work into another does not amount to an infringement. Further specifications are made under *Articles 31A to F*[37] for the circumstances of visual impairment in relation to copyright, it is stated that "(1) If a visually impaired person has lawful possession or lawful use of a copy ("the master copy") of the whole or part of (a) a literary, dramatic, musical or artistic work; or (b) a published edition, which is not accessible to him because of the impairment, it is not an infringement" for an accessible copy to be made, however, this would need to be restricted only for personal use. In addition, this does not apply to musical works, if it

[37] Added by Copyright (Visually Impaired Persons) Act 2002 c. 33 s.1

involves a part or complete recording of their performance, and of databases. In addition, this possibility only applies if an accessible version is not commercially available from the rights holder. The exception for educational purposes is specified under *Article 36* of this Act where it is made clear that the reproduction of an extract of a work for educational purposes is not considered an infringement, under the condition that reference is made to the author or rights holder and that the reference only amounts to 1% of the protected work. Additionally, this exception does not apply if a licence is available from the rights holder for the educational use of the work.

Articles 37 to 39 make it clear under which circumstances librarians have the possibility to copy parts of published works or articles. Provisions in relation to computer programs are made in *Article 50A to D*[38]. In connection to this, it is further made clear when a person may make a backup copy or a de-compilation of the program in question or its testing and studying. In addition, provisions are made for the executions of lawful use in relation to connected databases[39]. An illustration of the application of these provisions can be seen in Sony Music Entertainment v Easyinternetcafe (2003)[40], here the claimant aimed for a summary judgement against the defendant who owned several internet cafes. The infringement was seen to be the defendant's service to burn compact discs with songs that had been downloaded by his customers in return for the payment of a fee. The claimant argued that the copyright in the records was infringed since they were downloaded without the copyright owners' consent and this was contrary to the provisions contained in Articles 17 and 18 of the CDPA 1988.

The defendant, on the other hand, put forward that the copying of sound recordings was involuntary and therefore the defence under Article 70 of the same Act could be available to him. The court came to the

[38] Sections 50A to 50C have been inserted by Copyright (Computer Programs) Regulations 1992/3233 reg.8 (January 1, 1993)

[39] Added by Copyright and Rights in Databases Regulations 1997/3032 Pt II reg.9 (January 1, 1998)

[40] Sony Music Entertainment (UK) Ltd v Easyinternetcafe Ltd [2003] EWHC 62 Ch 51

conclusion that a copyright infringement of the records had taken place and that the actions of the defendant could not be considered involuntary for the purposes of Article 70. In addition, it was made clear that Articles 17 and 18 implied a strict liability. Further, the use of the defence was impeded by the fact that the copying was not done for private and domestic purposes, but on the contrary to gain commercial profit.

Although it is evident from the previous explanations that some essential priorities for social purposes, such as the consideration of the visually impaired and restricted availability for the purposes of teaching, are incorporated into the current legislation, this can hardly be interpreted as a counterbalance to the extensive rights holders' protection awarded under the current legislative system. The competing interests within copyright issues are mainly decided in favour of those of the creator and author, rather than on the side of the users who legitimately require access to these works. What essentially results is a legal framework which provides extensive security and enforceability for one side of the interests inherent in copyright. While an argument can be made that the gains derived from this are, to some extent, available as public funds, through taxation, and can be used for the furthering of social objectives, there is no predictability or legal guarantee that this will benefit those that have a need to access the works.

- ***Establishment of National Institutions***

The Copyright Tribunal is established and considered in *Articles 145 to 152*. The qualifications and extent of copyright protection are considered in *Articles 153 to 162*. Specifically it is made clear that "Copyright does not subsist in a work unless the qualification requirements of this Chapter are satisfied as regards (a) the author (see section 154), or (b) the country in which the work was first published (see section 155), or (c) in the case of a broadcast, the country from which the broadcast was made (see section 156)". Miscellaneous and general provisions are considered in the Articles from 163 onwards. Another important part of this legislation are the performers' rights which are considered in depth between *Article 180 and Article 212*, most of which have been restructured into Part II Chapter II, it specifically established that " Chapter 2 of this Part (economic rights) confers rights (a) on a performer, by requiring his consent to the exploitation of his performances (see sections 181 to 184), and (b)

on a person having recording rights in relation to a performance, in relation to recordings made without his consent or that of the performer (see sections 185 to 188)", as well as providing what is meant with 'performance', the independence of the conferred rights from the moral rights and the consent of the performer in relation to the copying, adaptation and making available of the performances in which they participated as well as the owner's properties rights in the work and the rights and remedies in relation to connected exclusive rights. The importance of institutions is central to this section of the law, since it ensures that the institutional measures are adequate to ensure the protection, enforcement and balancing of copyrights and interest groups.

EU Decisions

Since the regional interpretation of the binding provisions is also a guiding principle for the UK courts, it is necessary to have some understanding of the argumentation and preferences expressed on a regional level. An important decision from the European court in relation to the protection of copyright and a particular example of the considerations placed on international treaties in this connection can be found in *SGAE v. Rafael Hoteles*[41]. This case concerned a request from the Spanish national courts to the ECJ for a preliminary ruling and centred around the circumstance that SGAE was of the opinion that the utilization of television sets within hotel rooms in order to play music involved a communication to the public of works which it manages and that this act was a violation of the copyright relating to these works. In order to address this case adequately, the European court made reference to the applicable international law. In this context, it highlighted the TRIPS agreement as a binding international treaty on this subject matter, which was approved by the European Community through the council decision 94/800/EC. Further reference was also made to the applicability of the Berne Convention and the WIPO Copyright Treaty. These considerations highlight that the regional legislation and its enforcement need to be placed in an international context which emphasises the role of regional organizations to be a link between

[41] Case C-306/05, Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SA

international obligations and national interest. This need to connect international and national issues through regional interpretations is evident from the role of the regional court to give guidance to national courts on the interpretation of regional legislation and considering the relevant international obligations.

After taking all these points into consideration, in this instance, the European court came to the conclusion that the mere provision of physical facilities does not amount to a communication to the public in the context of the 2001 INFOSOC Directive. However, the distribution of a signal, irrespective of the means of distribution, to the televisions sets by the hotel to the costumers constitutes a communication in accordance with Article 3(1) of that directive. Further, it was also made clear that the private nature of hotel rooms did not contradict such an interpretation of communication to the public.

Another important community case which found wide application and reference from member states, in the context of copyright infringement is the ***Infopaq***[42] case. This arose out of the question whether the data capturing process, consisting of extracting 11 words from protected works and printing out this extract, amounted to a reproduction within the meaning of Article 2 of the 2001 Directive. The European court held that, in general, this could amount to a reproduction if the elements processed amount to an expression of the intellectual creation of the author; however, this was left for the national court to decide. In this context, it was further clarified that the relevant article of this directive only applied to original subject matter in the sense that it can be considered the author's own intellectual creation. Also the court explained that an act can be transient only if it is of limited duration, to what is necessary for the successful completion of the automatic technological process. Therefore, the printing out of the 11 word extract cannot be considered transient in the context of Article 5(1) of the 2001 Directive. This case illustrates the importance of the regional court, as well as its role in only guiding national courts and leaving them to make the final evaluations and decisions.

Yet another case which also illustrates the important relationship between regional and national courts in relation to the clarification and

[42] Case C-5/08, Infopaq International A/S v Danske Dagblades Forening

enforcement of copyright legislation is *Bezpecnostni Software Asociace*[43]. Here, the European court stated that it was the national courts' responsibility to ascertain whether the interface in question amounted to a representation of the author's own intellectual creation. In order to do so, the national courts should take the specific arrangement or configuration of the components of the graphic interface into consideration, in order to determine the originality of it.

A decision which highlights the importance of balancing the competing rights and interests of copyright can be seen in *Flos v Semeraro Casa*[44]. Here, the European court explicitly stated that the legislative measures implemented by a member state must be appropriate and necessary for the obtaining of the purpose of that national law – "namely ensuring that a balance is struck between, on the one hand, the acquired rights and legitimate expectations of the third parties concerned and, on the other, the interests of the right holders"[45].

In addition, national authorities should also take care to limit the measures taken to a level that is needed to ensure this balance. Similarly to the requirement placed unto national courts, also at a regional level, competing rights and interests need to be weighed against one another in the circumstances in question. If such balancing of rights fails on a regional level, then national decisions would also be influenced by the guidance towards one side or another and the entire regional system could be impacted negatively through an interpretation by the courts that focuses excessively on one set of copyright preferences.

Chapter Conclusions

The UK provides an interesting and valuable example of a country that has significant experience with copyright protection and that has developed its copyright system based on national needs and preferences, but later has incorporated international and regional provisions into it. The

[43] Case C-393/09, - Bezpecnostni softwarova asociace - Svaz softwarove ochrany V Ministerstvo kultury

[44] Case C- 168/09 Flos SpA V Semeraro Casa e Famiglia SpA

[45] Paragraph 57 of the decision in this case

currently firm foundation of copyright protection for the benefit of creators and creative industries provides a framework that benefits the entrepreneurial aspects of copyright. What can also be seen from the UK's national legislation is not only the provision of quite a few exceptions and limitations, but in addition these are then also dependent upon a complex set of conditions. While there are provisions for exceptions and limitations incorporated into the legislation, their actual application by courts is rather scarce and strict. This indicates a certain preference towards a strong protectionist copyright system with the balance tilted towards the creator's interests.

The regional framework to which the UK is a member has had an influence on its application and interpretation of international norms. On the other hand, it is safe to say the UK has also shaped the regional framework to some extent as it represents a member country with extensive historic experience and interest in copyright protection. The preference towards safeguarding and promoting creators and the creative industries is clearly evident in both the UK and EU legal framework. The provisions and powers granted to enforcing mechanisms and institutions in this context are essential as it ensures enforceability of these rights on both levels.

The shaping of the regional and national framework in accordance with particular interests and needs is a primary attribute of cross-border collaboration. However, some counterbalancing provisions that take into account the other side's interests in copyright are important so as to ensure a system which provides legitimate rights and benefits to those who require them. These balancing provisions do not necessarily have to be equal in detail, scope or specification, but should reflect a clear incorporation of social needs into economic markets. While national legislation and institutions are always the ones ultimately responsible for the implementation and interpretation of regional provisions, the regional regulations and decisions can establish a harmonised minimum standard of counterbalance. While the argument of cultural diversity and differences is relevant, the question remains; If cultural diversities can be disregarded to some extent in relation to creators' rights protection why not do the same in relation to exceptions and limitations that could benefit the wider public? Member states would still be free to implement these restrictive balancing provisions in a manner they prefer and which takes into account cultural

diversities. This would be similar to the situation in the Andean Community where, for example, essential exceptions such as those for libraries and teaching are region wide, but member states are free to implement these exceptions in the way they best see fit for their cultural context and social needs.

The benefit that is derived from this case study is the illustration of a developed country's situation in a regionally as well as internationally guided copyright framework. It represents a set of different preferences, approaches and interpretations from that of the other two countries in this research, in order to connect economic and social considerations of copyrights. This emphasises the conclusion that systems can be more or less balanced based on the distinct national and regional preferences in which they are established and utilized.

Chapter 7

Law and Policy in Chile

This chapter will explore how the national legislation of Chile has developed in the recent past in order to reflect developments in technology and international relations. It is essential to look at when and how the national legislation has changed, as this will give an indication of the impact TRIPS has had as well as provide a comparable case study as to the impact of bilateral treaties, rather than regional cooperation. The aim is to underline the Chilean approach towards creating a national copyright legislation which is in line with the international framework, while also trying to provide a balanced system that takes into consideration economic as well as social needs.

Although Chile can be considered a founding member of the WTO, due to its early participation in international organizations such as GATT and later the WTO, some academics[1] have found Chile to be particularly influenced by US trade policies and negotiation tactics. This aspect should not be neglected since even official studies[2] carried out for the benefit of international institutions have identified these pressure tactics as detrimental and hard to withstand for trading partners. While most of the focus is generally placed on the negotiation of Free Trade Agreements, the protection of intellectual property rights is an essential part of these treaties. The importance of copyright protection can be found in the recognition of the author's efforts and investment while also enabling future knowledge and culture creation[3].

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[1] "Reformas a la ley chilena de propiedad intelectual: el desafío de una regulación equilibrada", Daniel Álvarez Valenzuela and Marcela Paiva Véliz

[2] "Regionalism, Bilateralism and "TRIP Plus" Agreements: The Threat to Developing Countries", Ruth Mayne, 2005.

[3] Analysis of the complex situation for the production of knowledge can be found in "Generación y protección del conocimiento: propiedad intelectual, innovación y desarrollo económico", Jorge M. Martínez Piva, - particular reference to upcoming knowledge markets in pages 39 to 53

Recent Development of Legislation

The Chilean difficulties in relation to public policy and the balancing between economic and social aspects can be explained by looking back at the recent economic policies employed in Chile[4], and particular reference can be made to the developments in the 1990s when Chile expressed an interest in joining trading blocs. One commentator has suggested that the reasons for co-operation lie in the country's fear of being left behind by major trading blocs[5]. The chance to reintegrate a country that experienced much international critique during the previous government and needed policy changes after military dictatorship as well as the perspective of having come to the end of possibilities with unilateral liberalization and the wish to gain increased political support for seeking exceptions to general trade agreements.

These explanations and perspectives reflect the complex political and economic situation that Chile finds itself in, in relation to the international trade framework. It indicates that Chile feels somewhat that regional organizations do not quite fit with its interests and therefore prefers a strategy of stand-alone negotiations and trade agreements, exemplified by the more than fifty bilateral and multilateral trade agreements to which it is party. Recently therefore, Chile has been considered as having developed an anti-sub-regional policy and while it has entered into many bilateral and multilateral trade agreements with Latin American and other nations, it currently seems not to have any no aspiration of entering into a community, whether based on just trade or wider in scope[6].

- ***Basis for legislative amendments***

[4] "Liberalizacion del Comercio, Desarrollo y Politica Gubernamental", Ronald Fischer, 2001 - Here Fisher expressed a preference for a non-intervention of the government and plead for not generating regulations that can restrict the inventions of the industry.

[5] For example in Fischer's article mentioned above

[6] This can be seen for example from the Chilean exit from the Andean Community, its association but not membership od MERCOSUR and the interpretation of authors like Martinez and Fisher referred to above.

The foundations of the current Chilean copyright legislation are based on the legislation from 1970[7]. Over the decades, some amendments were made to this legislation of which the most recent and most significant ones were implemented in 2010. The legislative amendments which were made prior to the reconstruction of the law in 2010 mainly focused on the interests of the copyright holders, while almost completely ignoring the interests of users of the works. This approach is seen as having been enforced by the agreements of open trade between Chile and other nations, as these require a reform and strengthening of the national system. As part of these reforms, one can identify the significant increase in civil and criminal sanctions, as well as an improvement of judicial procedures and economic indemnification among others. In order to support this argument, focus can be shifted to the treaty between Chile and the United States of America and the regulations of IP protection imposed by this, while relating this back to some of the reforms subsequently implemented by the National Congress of Chile[8].

In order to transform the legal provisions in accordance to the principles laid out in international and bilateral agreements, three main aims were formulated for the modifications to the copyright law in 2010. The first aim was the establishment of effective measures to ensure an adequate level of protection through civil and criminal enforcement of copyright and neighbouring rights. The second aim was the establishment of an adequate framework of exceptions and limitations to guarantee access to cultural property and the exercise of fundamental rights by the people. The third aim was the regulation of the liability of Internet service providers, limiting their liability for breaches of copyright and neighbouring rights that are committed by users of these services through their networks in accordance with international commitments made by Chile[9].

[7] Ley 17336, Propiedad Intelectual, Biblioteca Congreso Nacional de Chile, 02.10.1970

[8] The previous point of view has been summarized well in the article written by Alvarez and Paiva – “Reformas a la ley chilena de propiedad intelectual: el desafío de una regulación equilibrada”, Daniel Álvarez Valenzuela and Marcela Paiva Véliz

[9] The Free Trade Agreement with the US was mentioned as a particular motivator for the modifications of the system aimed at in this third point.

TRIPS was mentioned specifically as the underlying obligation for compliance in order for an enactment of a network of exceptions and limitations[10], therefore acting as an international motivation to establish more balances within the national framework. These aims illustrate the importance that is placed on the reinforcement of the creative industries through legislative provisions, while also trying to integrate at least some counter-balance through the provision of access to works under some legitimate circumstances. It has been noted[11] that the system was rather biased towards the side of the creators prior to the changes made in response to these discussions in 2010.

In the context of balancing the interests and utilizations of copyright, it is also important to highlight the special consideration of public domain works. These were considered to be "an essential foundation for the development of creative activity. All creation is based on previously existing knowledge." Therefore, they need to be protected as copyright works. In order to achieve this, two new crimes were introduced to the system, making it punishable to "knowingly reproduce, distribute, make available or communicate to the public works that are in the public domain under a different name to the author, and claiming economic rights in the public domain works"[12]. While the effective protection and enforcement of works is essential, it is at least as important to ensure that there is no monopoly on the knowledge created.

Another important change was the general improvement of the applicable legal framework in response to individuals and criminal organizations which take part in the production of counterfeit goods. In order to achieve this, the maximum penalty was increased significantly, while also establishing a standard which "distinguishes between the person who sells illegal copies of copyrighted works, for profit, manufactures,

[10] Modifica la ley N° 17.336, sobre Propiedad Intelectual, Diario Oficial 04 de mayo, 2010

[11] "Reformas a la ley chilena de propiedad intelectual: el desafío de una regulación equilibrada", Daniel Álvarez Valenzuela and Marcela Paiva Véliz, 2010, ICTSD

[12] Ley Num. 20.435, Modifica la Ley N° 17.336 S obre Propiedad Intelectual page 18

imports, or holds for commercial distribution or rent these illegal copies"[13]. This legal distinction shows that there is a balance to be achieved between the protection of creators and the access of users who might infringe copyright without any commercial gain from such infringement. The prior reforms made in 2003 were revisited and it was emphasized that the focus of these changes was to comply with obligations entered into by the USA Free Trade Agreement.

- ***International Influence on Chile's Legislative Changes***

Great insight into the changes and intentions behind the legal modifications are given by the outline of the history and the discussions published by the Ministry of Interior and Public Security in the "Diario Oficial" – the official journal, which is a regular publication that contains the laws, decrees and also scholarly articles that are considered by the government to be of historic relevance[14]. Chile entered into the international treaties of the Berne Convention[15] and Rome Convention[16] in 1975 and 1974. There is evidence of the considerations that have to be paid to the balance of rights and competing interests; the law must, on the one hand, "provide conditions that encourage the creative activity and generation of knowledge...and, secondly, the need to ensure public access to these artistic and cultural creations and knowledge products[17]". The development of such works is not only essential to the national economy but also to the social and cultural growth of a nation.

Further justifications for legislative changes are based on bilateral and multilateral international agreements that Chile entered into. Chile has explicitly reaffirmed that it is aiming to establish a balanced system which

[13] Historia de la Ley N°19.928, Sobre Fomento de la Música Chilena, D. Oficial 31 de enero, 2004, (Biblioteca del Congreso Nacional de Chile)

[14] A list and access to many published editions can be found at http://www.diariooficial.interior.gob.cl/versiones-anteriores last accessed 14/03/2015

[15] Berne Convention for the Protection of Literary and Artistic Works (1886)

[16] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)

[17] Modifica la ley N° 17.336, sobre Propiedad Intelectual, Diario Oficial 04 de mayo, 2010

takes care of the different interests which are involved. This resulted in the establishment of the limitations and exceptions which favour some parts of society. It was recognized that it is important to reflect on the justifications of copyright protection and the corresponding importance of a balanced system which is able to respond to changes in circumstances. This is a consideration elementary to embedded liberalism in the context in which argues that the flexibility of a system to take into account the particular situation is essential to maintain the stability of a balanced legal framework on a national and international level. There is a broad consensus on the benefits of recognition of copyright based on the combination of theories of natural and utilitarian reasoning, which justify copyright as a way to encourage creative activity for the benefit of society.

Another motivation to make changes to the legal system, apart from international commitments, comes from the need to modernize the tools available to creators in order for their work to be protected. In line with bilateral treaties, Chile has incorporated specific standards of protection through its participation in international and free trade agreements. One of the agreements which had considerable impact on the legal provisions for copyright protection in Chile is the Free Trade Agreement signed between Chile and the USA. In regards to the most recent modifications to the legislation, the positive impact that technology has had on communication and dissemination of knowledge can be seen. At the same time, these technologies have created new forms of infringing recognized IP rights[18]. In order to regulate such violations, a limitation to the liability of Internet services providers, as contained in the Free Trade Agreement with the USA,[19] was adapted into the Chilean system.

Another change that was provoked by the Free Trade Agreement with the USA can be observed in relation to the authorization of an author of works contained in a phonogram. Here, the authorization of the

[18] Modifica la ley N° 17.336, sobre Propiedad Intelectual, Diario Oficial 04 de mayo, 2010

[19] Article 17.11.23 of the Free Trade Agreement with the United States

artist/performer and producer must both be present without excluding each other[20 and 21].

The implementation of Article 14 of TRIPS is of vital importance in the current legal climate of Chile[22]. In the last few years, many cases have arisen in relation to the protection of sound recordings and, in particular, the unauthorized use of these recordings in different situations. These cases are argued on the basis of national legislation but the basis of the TRIPS Agreement can be seen throughout. A variety of cases has arisen in relation to the unauthorized communication to the public of protected musical pieces and these will be explained in the course of this chapter[23].

In relation to the balancing of the national system, special reference can be made to the need for exceptions and limitations to counteract the kind of monopoly powers conferred upon the author of a copyright protected work. Article 9.2 of the Berne Convention establishes the possibilities of a "fair use" of the protected work and can be seen as an important international motivator for the establishment of balancing regulations. This would apply in circumstances of educational purposes, commentary and academic interests. This shows that the regulations of the revised intellectual property legislation take international conventions and agreements into consideration in order to provide more of an equilibrium between the different legal provisions. This understanding supports the view of a basic need for the balancing of rights to be part of a legal framework, in order to ensure access to and legitimate use of works by the public, as well as the possibility of further creative pieces to be built upon them. Therefore, again, this is an example of how social needs and priorities can be part of the establishment for economic rights.

[20] Historia de la Ley N°19.928, Sobre Fomento de la Música Chilena, D. Oficial 31 de enero, 2004, (Biblioteca del Congreso Nacional de Chile),

[21] Modifica la ley N° 17.336, sobre Propiedad Intelectual, Diario Oficial 04 de mayo, 2010

[22] "Nueva Ley de Propiedad Intelectual: un alcance fundamental", Iñigo de la Maza, 2010, EL Mostrador

[23] See for instance reference numbers 26 and 30 below

Current Legislation

- ***General Provisions***

The Intellectual Property law of Chile[24] considers copyright protection and associated rights. The first Article sets out the essential principles of this form of IP protection; in particular, it sets out that protection is given to works just because they were created, thereby making sure that no registration is required. The remainder of *Articles 1 to 5* lay down the essential basics of copyright protection. The main list of works protected under copyright is contained in *Article 3* of the legislation and includes, among others, books, articles, speeches, lessons, theatre plays, musical compositions, photographs, cinematic works, paintings, computer programs and adaptations of these works. *Articles 6 to 9* deal with the author's rights, as far as determining what is to be considered a divulgation of his work and who is to be considered the author of a work. Following this, *Article 10* establishes the duration of copyright protection as lifetime plus 70 years. *Article 11* concerns the common cultural heritage in Chile, these can be used by anyone as long as the patrimony and integrity of the work are respected.

The moral rights of an author are laid down in *Articles 14 to 16* of this law. Most importantly, these rights are declared to be in-alienable and any agreement to the contrary is to be considered void. The specific moral rights which are protected are the claiming of paternity, the right to object to any mutilation or defamation of the work, the right to keep the work unedited, the possibility to authorize third parties with the editing and distribution of the work and the right to keep the work anonymous.

The interpretation of several Articles of the Intellectual Property law, including some of those referred to above, can be seen in *Case 3.788-2009*[25], which revolved around the playing of music in a shop in order to demonstrate technical/musical equipment. The defendant failed to demonstrate that the communication of music in his shop was made solely

[24] Ley No. 17.336, Propiedad Intelectual, 4.May 2010

[25] Fallo: 3.788-2009.- veintiuno de septiembre de dos mil nueve. Tercera Sala

for the demonstrations. The dissemination of the works had been limited to such, under Article 42 of the Intellectual Property Law. The defendant confessed that there were several radios, monitors, televisions and other electronic devices in operation in his shop which played works from national and foreign artists audible throughout his premises. These works were part of the repertoire of the Chilean Copyright Society. Further, it was made clear that the shop had no area which was designed exclusively for the demonstration of television receivers and audio equipment for sale. On the other, the appellant was affirmed to be an authorized collecting agency for the administration of public communication of musical works, which are part of its repertoire[26].

The first legal provision which was taken into consideration by the court was Article 19 under number 24 of the Constitution which provides all people the right to different kinds of property, whether tangible or intangible. Then, Intellectual Property Law was considered, starting off with a reference to Article 1 which establishes that rights are protected from their creation onwards and irrespective of their mode of expression. This protection also extends to neighbouring rights and, under paragraph 2, also patrimonial and moral rights which safeguard the use, paternity and integrity of the work. The court's attention then turned to Article 5 of the Act which establishes that public communication is an act done through "any means or process serving to convey the signs, words, sounds or images, currently known or to be known in the future, for which a number of people, whether or not in the same place, may have access to the work without prior distribution of copies to each of them, including the making available of the work to public, so that members of the public may access it from a place and at a time individually chosen by them." Articles 17 and 18d) were also considered to be of material importance as well as Article 11 of the Berne Convention. These provide that the authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right to authorize others to publicly perform their works as well as the communication to the

[26] In accordance with Articles 91-95 of the Intellectual Property Law and under Article 102 of the same law, the Chilean Copyright Society (SCD) has the authorization to represent its members in all kinds of administrative and judicial proceedings.

public of their works, by any form, representation and execution of their works.

These interpretations highlight the protection awarded to essential rights contained in this legislation. The court further made it clear that the burden of proof lay with the defendant to show that he had only spread works which are part of the common cultural heritage or that he had obtained an authorization required by law under Article 19 of the relevant law for the works that form part of the repertoire of the SCD. The defendant failed to provide any evidence of possessing such an authorization. The supreme court came to the conclusion that the judgment of the court of first instance should be upheld, which awards compensation for damages and fines and in addition ordered the immediate cessation of misusing the works. It also applied the provisions of Article 42 of the Intellectual Property Law by taking into consideration the surface area that was occupied by stereos and video equipment for the calculation of costs.

Another case which illustrates some more of these essential principles is Case 3.313 - 2007, which concerns the unauthorized diffusion of protected music in the commercial establishment of a shop. These musical works were made by national and international authors, who are represented by the Chilean Society for Copyright. No licence was obtained by Johnson´s from the Chilean Society for Copyright for the musical works in question. As a consequence, the Chilean Society asked for an indemnification of more than 9.8 Million Dollars, as calculated on the basis of the square-meters of the shop concerned, the time period of the use without a licence and the resulting interest. The original demand was placed upon Article 21 of the Intellectual Property law[27] which establishes forms of authorization which are granted from the author and the regulations attached to these.

The arguments against an infringement of this Article were, for example, that the place in which the music was played did not have the characteristics of an auditorium, public radio or service station. The establishment is owned by a private company, which controls the access of the public to their premises on terms which they set. Further, the definition

[27] Artículo 21 de la Ley 17.336

of the word "exploitation" was taken into consideration. Based on the arguments presented, the court decided that in this particular case the requirements of Article 21 were wrongly interpreted and that therefore no authorization for the playing of music at the premises was required.

In the course of the appeal, an argument was brought forward in the Supreme Court on the basis of an infringement to Article 19 of the Intellectual Property law while recognising that no infringement took place in regards to Article 21[28]of this legislation. The Court made it very clear that the requirements of a "public place" in Article 21 correspond to a location to which the general public has access and that the offices of a department store are clearly private. Based on these considerations, the court could not find that the alleged errors of law existed and the appeal from the Chilean Society for Copyright was therefore rejected. What can be seen in the previous case is that the Chilean courts take into consideration a variety of particular circumstances, such as the private or public character of a place and the according legislative provisions, when considering how to balance the different rights and priorities brought before it during the arguments and do allow some room for defences and applicable justifications. This highlights the importance of the national court in balancing the different rights and interests against each another on the basis of the legislation and the specific circumstances. This interpretation however can only go to a limited extent if the legislation does not allow for sufficient scope in balancing the copyright protection and access to it. Therefore, balancing provisions need to be present within the legislation in order for them to be utilized before the court.

- ***Entrepreneurial Rights***

The economic rights conferred upon an author are considered in the following articles, *17 to 23*, which particularly look at the regulations in relation to forms of authorization from the owner of the copyright. These granted rights include, for example, the right of the copyright owner to publish, distribute, amend and to communicate his work to the public. These rights are granted exclusively to the copyright owner or to those

[28] This Article states that "No one may publicly use a work of the private domain without an express authorization from the author".

persons that have been authorized by him. In *Case 4.898 – 2008*[29], the court explained the underlying reasoning of copyright in providing compensation to the author of the work from performers, presenters and radio broadcasts of all or part of literary, musical or film works as well as broadcasts in theatres, cinemas, commercial businesses , public places and in general by all establishments that operate for profit. In regards to this, the court also considered that the defendant subscribed to the broadcaster with the intention of benefitting the customers of his commercial establishment. Therefore, the subscriber did not need to obtain a separate authorization for the public communication of music within his establishments.

The application of these provisions can be seen in a case that was decided by the Supreme Court: *Case 2077 - 2008*[30] . This illustrates the application of the essential Articles of the legislation in relation to the protection of the creator's rights and interests. This case revolved around the defendant who brought the appeal against the decision of the Court of Appeal. The defendant had publicly exploited works from various authors which are under the administration of the Chilean Society of Copyright. During the previous court proceedings, the Court of Appeal imposed a burden of proof on the defendant in order to demonstrate that the works which were broadcast and performed in his establishments are not part of the repertoire of the SCD and that there appears not to have been granted an authorization as required under Articles 19, 20 and 21 of the Intellectual Property Law. The defendant argued that there had been a violation of the Code of Civil Procedure, since an injury was inferred from the unaccredited fact that there had been a violation of intellectual property law, in relation to the placement of the burden of proof upon him, rather than on the plaintiff. The defendant continued to appeal against the imposition of damages under Articles 19 and 78 of the Act because it remained to be proven that the shop exploited musical works publicly administered by the Chilean Society of Copyright without an authorization from the plaintiff or the owners of the copyright.

[29] Fallo: 4.898 - 2008 - uno de agosto de dos mil ocho

[30] Fallo: 2077-2008.- veintiocho de septiembre de dos mil nueve. Tercera Sala

Upon judgment, the Supreme Court started off by stating the two facts which are apparent from the outset, namely that the Chilean Society of Copyright manages copyrights and neighbouring rights in accordance with Articles 91 and continued of the Intellectual Property Law. The second established fact referred to the fact that the defendant operates a business establishment in which musical works are broadcast. From these initial observations the court continued to state that there was no violation of the Civil Code in relation to the burden of proof, since this is a special situation under the law in which the defendant has to show that the works which were performed or broadcast in a commercial establishment are not part of the repertoire of the Chilean Society. Due to the fact that there was no evidence provided that this was the case, the court considered it a fact that the defendant operated a business which broadcast contemporary music and that the musical works used are incorporated into the repertoire which is administered and protected by the Chilean Society of Copyright, as this is the case with most musical creations[31].

Another interesting case is the *Case 346-2010*[32], which arose out of the copyright protection centred on a large number of counterfeit CDs. The established facts of the case were that the accused was caught in a building with 3414 CDs containing counterfeit music, film and video game material, which constitutes a violation of Intellectual Property Law. In addition, there was a CPU used for the production of such discs within the premises. The amount, variety and nature of the seized materials were considered a clear indication of the intent for commercial use. Specific reference was made to the provisions contained in Article 80 of the Intellectual Property law which make it clear that " a) with violation of the provisions of this Act to the rights it protects, the perpetrators involved for profit in reproduction, public distribution or introduction into the country of phonograms, video, photo albums, cassettes, videocassettes, films or films or software, or b) in contravention of the provisions of this Act or the rights it protects, the perpetrators acquire or have in his possession for purposes of sale phonograms, video, photo albums, cassettes, videocassettes, films or

[31] The placement of the burden of proof on the defendant is distinct from the situation in Ecuador. This can be seen in the cases summarized in chapter 5 of this research.

[32] Corte de Apelaciones de Antofagasta, de 03.11.10, ROL 346-2010

films or software". The legal protection referred to here was clarified as being the IP right of the authors or owners of such works.

The defendants were therefore considered to be in violation of Articles 17 and 19 of the law by holding a large amount of copied material without the appropriate permits and consequently without paying royalties to the owners. In addition, the number of CDs and the even larger quantity of plastic covers and the fact that the defendants had several copies of the same title circumvented any reasonable doubt that their intention was to sell these goods to third parties. The appropriate sentence was considered in relation to an infringement of Article 80b in its recent adaptation in 2010 as amounting to either relegation or a minimum imprisonment between 61 and 540 days. In order to assess the appropriate measure for the defendants in this case, the court considered the circumstances and facts of this case and concluded that the gravity of the offence in the violation of Articles 1,17,19 and 80b of the Intellectual Property Law justified imprisonment for both defendants.

Provisions are made for special norms in relation to articles, encyclopaedias and compilations[33] and legal regulations in relation to cinematographic works are laid down[34]. The according rules in respect to paintings, sculptures and other artistic works are considered in *Articles 36 and 37*, and *37bis* looks in particular at computer programs. Contracts for the edition of copyright protected works are regulated in great detail, including the rights which can be conferred in such a contract and the reasons for which an author might retract the contract[35]. Another important type of contract in relation to copyrights is the one for representation and *Articles 56 to 64* set out the legislative provisions for these. Neighbouring rights are defined and regulated in the following *Articles 65 and 66* of this law and particular reference is made here to the interpretation and execution of copyright protected works. Phonograms and radio programs of music are dealt with in *Articles 67 up to 69,* in particular the rights of the producer in relation to these copyright protected works. The duration of the

[33] Article 24 of the current Chilean copyright law

[34] Articles 25 up to 35 of the current Chilean copyright law

[35] Articles 48 to 55 of the current Chilean copyright law

copyright connected rights is established as 70 years from the end of the civil year in which the interpretation or similar have been published[36].

- ***Infringements and Enforcement of Copyright***

The establishment of rights needs to be supported by a sound framework for the enforcement and safeguarding of these through legal and institutional measures, since otherwise no confidence and predictability of the system could be found, which in turn would have a negative impact on investment, the creative industries and the creation of knowledge. Therefore, the provisions of the Register for Copyrights are established in *Articles 72 to 77 of the Intellectual Property Law*. From *Article 78* onwards, the guidelines for the determination of infringements and according sentences are established. *Article 79* lays out what is considered as constituting an infringement of the copyright law and *Articles 80 and 81* one establish the sanctions corresponding to such an infringement. In the *Articles from 82 to 85A* the sentence guidelines are specified.

The Civil and Criminal Procedures and the special civil procedures applicable in response to an infringement of a copyright protected work are dealt with in *Articles 85B to 85K*. *Article 85 B* which, for example, makes it clear which actions can be requested by the owner of the rights, these actions include the termination of unlawful activity as well as the request for compensation for economic and moral damages incurred. *Section D* further explains the available options of precautionary measures which may be ordered by the court at any stage of the proceedings. Section *F of Article 85* looks at the way how indemnity can be enforced by the court while the section after that considers that special investigation may be used when the involvement in conspiracy is investigated. The following sections of *Article 85* concern special rules which might be applicable to civil proceedings. This encompasses that the court may order alleged violators to provide all information held about others, under section J, as well as providing for the request that a lump sum shall be paid as a replacement for compensation.

- ***Penalties***

[36] Articles 70 and 71 of the current Chilean copyright law

Another Article which has been adopted is Article 81 which establishes the penalty range for offences of intellectual property rights in order to make a profit; this encompasses a prison sentence as well as a variable fine. The maximum penalty is applicable for re-offences within a 5 year period after the original conviction for a crime described in this Act and the fine shall be more than twice the previous maximum amount; this is contained in *Article 82*. *Article 83,* on the other hand, refers to special cases of organized crime in relation to IP offences. *Article 84* refers to the circumstances in which liability arises for the induction or facilitation of infringement of information about rights management. Before the changes were carried through in 2010, it was proposed that the fines should be significantly increased in response to situations in which, for example, protected works were used without the authorization of the copyright holder or when literary, artistic or scientific works are falsified and these increased fines would also be applicable when copyright protected works were plagiarised or maliciously altered[37].

Another important modification was made to *Article 100* in order to establish that fees may be differentiated in accordance with user categories[38]. The amendments of Article 100 have decreased the powers that until then were held by management companies to set their rates as a core right, which corresponds to the extension of the powers delegated to it by the author[39]. The limitation of some of these rights can also be interpreted as an attempt to bring more balance into the copyright system, by evening out some of the powers awarded to rights holders and those utilizing copyrighted works.

- ***Precaution measures***

[37] Historia de la Ley N°19.928, Sobre Fomento de la Música Chilena, D. Oficial 31 de enero, 2004, (Biblioteca del Congreso Nacional de Chile),

[38] Historia de la Ley N°19.928, Sobre Fomento de la Música Chilena, D. Oficial 31 de enero, 2004, (Biblioteca del Congreso Nacional de Chile),

[39] Historia de la Ley IM° 20.435, Modifica la ley IM° 17.336, sobre propiedad intelectual

Further provisions which are enacted by the recent modifications of the law is that the court hearing a case may, at any stage of the proceedings and upon request of a party, order precautionary measures. These include: "1) the immediate suspension of the sale, circulation, exhibition, execution, performance or any other form of exploitation allegedly infringing 2) the ban on acts and contracts concerning specific assets, including the prohibition of advertising or promoting products or services because of the alleged violation, 3) the retention of copies allegedly wrongful 4) the retention or sequestration of materials, machinery and implements that have been used in the production of copies allegedly illegal or allegedly infringing activity when necessary to prevent further infringements, 5) the removal or withdrawal of unit that has been used in unauthorized public communication, unless the alleged offender will not resume sufficiently guarantees the infringing activity, and 6) the appointment of one or more inspectors."[40] In addition these measures can also be requested if the i) background is capable of establishing the existence of the right in consideration, ii) there is imminent risk of infringement and iii) there should be enough security.

The exercisability of these rights to no less than seventy years from the date of first publication of the original work has been established in response to the US Free Trade Agreement. A further agreement whose origin can also be traced back to this Free Trade Agreement is the compensation scheme, under which the rights holder has the option to acquire compensation for economic and moral damages caused in form of a lump sum which is to be determined by the court in relation to the seriousness of the offence.

The *Case 4.898 - 2008*[41] provides us with an example of the involvement of the administrative institution. This case concerned the defendant "Sociedad Comercial Jeria y Compañía Limitada" who appealed against the judgment from the Court of Appeal, which upheld the previous sentence of the defendant to pay copyright compensation to the Chilean Society of Copyright for damages. The issues revolved around the

[40]LEY NÚM. 20.435, MODIFICA LA LEY N° 17.336 SOBRE PROPIEDAD INTELECTUAL, page: 8

[41] Fallo : 4.898-2009.- veintinueve de octubre de dos mil diez. Tercera Sala

determination whether the defendant was required to obtain authorization under the Intellectual Property Law and whether the music which was used indeed formed part of the repertoire under the administration of the Chilean Society of Copyright.

The claimant began to argue that the documents presented at trial were sufficient to show that the company in question effectively used musical works which were protected under copyright in its establishment, while also leasing services to another company in the industry "Scamusica Ltd", which did not just provide the repertoire but also the audio and radio equipment necessary and the defendant made a payment to this company for the use of these. The appeal continues to state that indeed there was a contract between "Scamusica Ltd" and the Chilean Society of Copyright, which involved authorization. Therefore, the judges must have wrongly concluded that the defendant committed a wrong based on their criticism of the absence of such an authorization.

Further, it was stated that there were possible violations of Article 79 as well as Articles 18, 19, 20, 21, 91 and 100 of the Intellectual Property Law and also of several provisions of the Civil Code. This was considered due to the incorrect interpretation of the law by the previous courts, to the effect that prior authorization should be obtained before music is broadcast to someone who does not require such an authorization. It seemed to be an accepted fact, however, that the defendant used a radio to broadcast music in his business premises which was open to the public without the relevant authorization and therefore apparently in violation of Article 21 of the Intellectual Property Law. The court now had to decide whether the subscribers to broadcast organizations are also liable to obtain a corresponding licence.

The Supreme Court concluded that the subscriber did not need to obtain a separate authorization for the public communication of music within their establishments. The main point which was stressed at this stage is the fact that the services of another company were used in order to provide background music and that this company in turn had prior authorization for the trade, provided to them against the payment for a fee and that the subscribers had to be included in this authorization from the Chilean Society of Copyright. A strong statement was made to the Chilean

Society of Copyright, namely that in its work of administering intellectual property rights, it cannot seek to extend the rules established in this matter as was attempted in this case which constitutes a direct effect of a previously authorized commercial activity. The court also made it clear that the contract between the Chilean Society for Copyright and "Scamusica Ltd" can only be interpreted as authorizing the use of musical creations and sound recordings under their administration, through "Scamusica Ltd" as an intermediary to others for use by them in private or public. Considering this, it was seen as pointless to request from the defendant to obtain another authorization. Therefore, the Supreme Court concluded that the previous judge had erred in his interpretation of the law as no violation of the Intellectual Property Law took place and therefore no compensation or damages were due, the claim was rejected and the appeal was admitted.

What is clearly evident from this judgement and the considerations is that the national institutions are instrumental in safeguarding and enforcing rights and that the rights and penalties have to be weighed carefully by the courts in order to determine whether there has been an actual infringement within the context of the legal limits prescribed under the Intellectual Property Law, in order to protect the creator's rights but also allow the legitimate operation of businesses utilizing and disseminating these creations. The benefit that is derived from creative industries is something that could benefit society if the gains derived are reinvested into matters of social concern. However, this depends largely on policy decisions and is therefore only predictable to very limited degree. The provisions that are incorporated and applied within the national legal framework are however more stable in comparison and essential exceptions for access and utilization of knowledge are essential for the balancing of distinct interests, even over a period of policy changes. The amendment of legislation requires more consideration and effort than policy decisions as to public investment, for example, therefore more predictability would be granted not only to creators and industries relying on copyright but also the wider public.

- ***Limitations and Exceptions***

Without a doubt the most extensive changes were made to the section of limitations and exceptions to copyright and neighbouring rights. These changes were essential to balance the system which was previously even more focused on the protection of the author. In Chile, Article 71 now provides for a long and explicit list of circumstances in which copyright protected works might be used legally without the express authorization of the rights holder or the need to pay him remuneration. It states; "Article 71 A. When appropriate, the limitations and exceptions set forth in this Title shall apply to both copyright and neighbouring rights" The following subsections provide, among others, for exceptions in relation to illustration, criticism, teaching and research if the original source, title and author is mentioned. The same condition of identifying the author and source in a legible manner applies to reproductions of photographic or plastic works. Additional provisions are made for the ability to adapt, reproduce and distribute works to ensure access by the visually or otherwise impaired, while it is also possible to collect public lectures at universities and institutions, these may not be published without the permission of the author. Other specific exceptions apply in the circumstances of demonstrating musical instruments, radios or televisions as long as the reproduction is done with for the sole purpose of demonstration. Section 71 J to N include exceptions for libraries, for example "

Libraries and archives are not for profit may reproduce the work in the following cases:

a) When the copy is in its permanent collection and this is necessary for the purpose of preserving that copy and / or replaced …b) To replace a copy from another library or archive that has been lost, destroyed or irreparably damaged and the work is not available in the market….

c) To add one to your collection when it is not available in the market over the past 5 years…."

And Article 71 L. "Libraries and archives …may, communication or making available by digital media works from his collection to be viewed simultaneously to by a reasonable number of users…", as well as make translations of works originally written in foreign language and legitimately acquired.

Under Article 71 Ñ. Special provisions are made for the inclusion of short works in the framework of formal education and under the requirement that no more than two works are included from the same author and they do not represent more than 7% of the overall educational content.

It is made clear that it is not considered communication or public performance of a work if it is used within the family, educational establishments, charities, libraries, archives and museums, where such use occurs without any commercial interest[42]. In addition, consideration is also placed on exceptions in relation to computer programs and temporary storage of data, for example in relation to achieving adequate use of the program or enabling interoperability or testing of the program, which applies only if the program has been obtained lawfully and the corresponding authorization from the rightful owner has been granted[43].

It is also explicitly stated that additional “exceptions shall be permitted other than those prescribed above, provided that it is restricted to special cases which do not conflict with normal exploitation of the work, the performance and the phonogram, or unreasonably prejudice the legitimate interests of the rights".

What can be seen by the list of included exceptions and limitations is that many circumstances of legitimate use have been incorporated and most of them without excessive conditions. The two most common conditions placed upon the application of these exceptions are that the works were lawfully disclosed and that none of the exceptions are used in order to derive a commercial benefit from them. In this context, these conditions are justified since they ensure that no exploitation is conducted of the works which would be detrimental to the creator. What is also important to consider is that these exceptions still represent very limited circumstances of application. The creative industries, which are a considerable part of Chile’s economy[44], are still protected and the national

[42] Article 71 O of the current Chilean copyright law

[43] Article 71 P and Q of the current Chilean copyright law

[44] For example in 2003 the creative industries in Chile represented 1.9% of countries GDP, the importance of this has been remarked in “Key role of cultural and creative industries in the economy”, Hendrik van der Pol, UNESCO Institute for Statistics, Canada

concern for their security remains evident within the extensive and far more detailed provisions for the creator's rights protection and enforcement under the new national legalisation.

A great explanation was written in regards to changes of the IP Law No:20,435[45] and especially the necessity for adequate exceptions and limitations on copyright protection. A very important reference is made in relation to the international applicable agreements. It states that an adequate framework of exceptions and limitations to copyright should be formed in order to ensure access to cultural property and the exercise of fundamental rights by the citizens, as recognised by TRIPS and reaffirmed in bilateral agreements by Chile. In addition, this project is aiming to improve the standards and rearrange the exceptions. The preamble of the WIPO treaty on copyright explicitly states the need to strike a balance between the rights of authors and the general public interest "particularly in education, research and access to information". This is an important consideration in order to understand the context in which Chile sees its national copyright framework and the connection which this has with international and bilateral treaties. The awareness that the national law does not operate in isolation is an important recognition of the need for the system to conform to international obligations, which in this context actually help to motivate the reform of the national law towards a more balanced approach between competing economic and social interests.

Fifteen professional associations made reference to the previous proposals for amendments to the law. The government was urged to consider new legislation on intellectual property to preserve the spirit that created rights regulations on intellectual property at a global and national level, which is none other than the principle enshrined in the Declaration of Human Rights. Seeking a balance between the rights to property and the rights of citizens to enjoy the arts and participate in scientific progress. This illustrates the strong opinions that the public had in relation to the need for the legislative system to be adapted into a format which would make legitimate access to and use of protected work more achievable.

[45] Historia de la Ley IM° 20.435, Modifica la ley IM° 17.336, sobre propiedad intelectual, Diario Oficial 04 de mayo, 2010 (Biblioteca del Congreso Nacional de Chile)

Another factor is the essential requirement for basic reading comprehension. Chile has serious deficiencies in this respect and there is an urgent need to strengthen the implementation of measures such as those proposed in the National Book Policy and Reading to help restore books to the centre of the educational process. In a balanced system, both owners and users of information should be protected while also observing public and social priorities and interests. Libraries themselves represent the balance between creators and readers. All coexist and nourish as an active part of the cycle of creation, reading and re-creation. Through this naturally encouraging the future reader, consumers of information, to assume the role of creators, authors and/or producers of intellectual property[46]. This was discussed specifically in relation to Articles 71A and 71B as well as Article 10 of the Berne Convention. Additional arguments were put forward based on the examples of the EU and US copyright law which also make provisions for exceptions within the scope of a harmonized international framework[47].

The main aim was therefore to resolve gaps in the previous legislation with regards to the use for educational purposes, libraries and disabled access, as well as the provision of compulsory licenses or exceptions for educational proofreading. What can be seen from the establishment of these exceptions is that there has been increasing awareness in Chile of the need to make provisions for certain circumstances which benefit the public as a whole rather than just focusing on the needs and benefits of the copyright industries. The principle of the need for a balanced system is also highlighted within the concept of embedded liberalism as this also argues that social preferences and priorities ought to be incorporated into economic rights protection so as to avoid detriments to the public interest at large[48].

[46] These points were brought forward by national associations as well as in a joint report by the Liberians Association of Chile, the Publishers Association , the Library Advisory Commission of the Council of Digital Rights Bodies and NGOs and summarized in ”Historia de la Ley IM° 20.435”

[47] “Historia de la Ley IM 20.435” see page 32 and for further examples of support for the exceptions and limitations refer to pages 59 and 88

[48] Historia de la Ley IM° 20.435, Modifica la ley IM° 17.336, sobre propiedad intelectual, page 31

The interpretation of several Articles of the Intellectual Property law can be seen in the *Case 3.788-2009*, which revolved around the playing of music in a shop in order to demonstrate technical equipment. The court made it clear that the burden of proof was placed on the defendant to show that he only disseminated works to the public which were of common cultural heritage or alternatively that he had obtained an authorization from the relevant authors or collecting societies. The court came to the conclusion that the defendant had failed to obtain such an authorization and in addition he could not convince the court that he used these works for the sole purpose of demonstration. On the basis of the facts and taking into account these requirements, the court therefore decided in favour of the plaintiff[49]. However, this case also shows that the court took the argument into consideration that there might be no actual infringement because the works would only be used to demonstrate the products for sale. One could consider that if the facts of the case had been slightly modified (i.e. if there had been a separate area for the demonstration of the equipment), this might have been accepted by the courts, in their function of balancing the competing interests and rights presented before them.

The provision of adequate exceptions and limitations is paramount to the understanding and application of the concept of embedded liberalism, as there is a necessity to balance the competing interests of rights holders with those of the public in order for copyright protection not to amount to a monopoly that cannot be accessed for the benefit of social needs. What can be seen from the extensive changes to the available exceptions and limitations on the one hand and those changes made in relation to procedures and penalties on the other hand is the Chilean struggle to balance at times conflicting interests and obligations with each other under its national legislation. As mentioned previously, the fact that it is a party to so many bilateral agreements means it has to establish the protections it agreed to in accordance with them, while, on the other hand, at a national level, it could not carry on having copyright legislation which

[49] Fallo: 3.788-2009.- veintiuno de septiembre de dos mil nueve. Tercera Sala

have been identified as heavily siding with the rights of the creative industries[50].

- ***Collecting Societies***

The remainder of this legislation makes provisions for general issues, such as the establishment of a department for Intellectual Law, procedural references to the Civil Code and guidelines for the time frame of different procedures associated with copyright protection. *Article 91* makes it clear that only authorized entities are allowed to act as collective entities for copyrights and related rights in accordance to the provisions of the legislation. *Article 92* further provides that these societies must be incorporated under Chilean private law and their objective is confined to activities management, protection and collection of IP rights. In addition some operational aspects are made clear, for example that the general meeting of members shall decide by absolute majority. Also, ten per cent of the proceedings and some of the social funds received from their activities are to be used for promotion or assistance services for its members and national development. The regulations that the societies should make in their statutes are laid out in *Article 93*, for example the specification of what rights it intends to manage, a voting system and the percentage for administrative expenses as well as asset distribution. Another important provision is contained in *Article 95* which makes it clear that societies have to be authorized by the Ministry of Education within a range of conditions. For example, part b of this Article makes it clear that the applicant organizations should at least represent 20% of the original rights owners; these can either be Chilean nationals or foreigners domiciled within the country. *Article 97* on the other hand makes it clear that these societies will always be "forced" to accept the administration of copyright that are given to it on the basis of its objectives. The fact that the collecting society has an obligation to contract with anyone who requests the non-exclusive licence to use its repertoire on the basis of the general rate of remuneration for such use is contained in *Article 100*. Among others, this Article also makes it clear that the fees are set by the managing society and that it may establish different rates according to the user categories.

[50] See the explanations made by the authors in reference number 1 above

The *Case 7.179 - 2008*[51] concerned a claim in respect of Articles 17,18, 19 and 21 of the Intellectual Property law and provides a good example for the working of these Articles as well as the importance of the Chilean collecting society in practice. This case arose specifically out of a claim for unauthorized communication to the public of music in the commercial establishments of "Empanadas de Emeterio II". The Chilean Society for Copyright argued that different musical works from national and international artists are broadcast to the public in this restaurant. There was no contract or licence which authorized the use of these works by the defendant nor was there any payment for the right to use these works, based on the facts that the defendant was not able to show that he had the corresponding approval for the use of the music, which was part of the protected repertoire under administration by the SCD.

The Supreme Court stated that due to his failure to request authorization and the corresponding non-payment of the fixed rate associated with a lawfully obtained licence, he deprived the people associated with the making of a musical piece (writers, producers, etc.) of the compensation that would have rightfully been appropriate to them. As a result of this, the defendant was held liable for the payment of compensation for the damages caused and to pay the fees which would have been payable during the period concerned. In addition, the defendant was also sentenced to the payment of a fine, of five monthly tax units, in accordance with Article 78[52] of the Intellectual Property law, due to his conduct at court and for the offences committed under Articles 19 and 21 of the same Act. Once again, the strong involvement of the Chilean Society of Copyright can be observed. It is an important institution for the national legal framework as it steps in to support the interests of rights holders and therefore aids the application and enforcement of the protective measures established in law.

[51] Fallo: 7.179 – 2008, Corte Suprema de Justicia, veintidos de julio de dos mil diez

[52] This Article established that a violation of the law contained in this Act is punishable by a fine in the region between five to fifty monthly tax units.

Chapter Conclusions

It can be seen that, although changes to the original legislation were made in 1990 and 2003, especially to the types of work which can be protected under copyright law, in order to include technological developments such as computer programs, the reform in 2010 of this law has had the most striking impact. The motivation for some of these changes have been repeatedly identified as being international obligations arising out of TRIPS as well as bilateral agreements which laid out certain requirements for change. The most urgent change, longed for by several interest groups within Chile, was the establishment of a new system of exceptions and limitations, since the prior system was seen as being rather biased towards the rights holder, while one of the declared aims of the new legislation is to make knowledge more accessible.

Taking all of the above points into consideration, it can be seen that copyright legislation in Chile has been greatly pushed forward through its international collaboration and that the bulk of the changes have been made by one major reform. This reform was however not exclusively promoted by TRIPS, but also by the continued insistence of international organisations such as WIPO on the necessity of adaptation of member states' legislation and also through the bilateral agreements to which Chile is party. The issue of balance within the national legal framework has neither been expressly promoted through the bilateral treaties nor TRIPS, rather, internal campaigns were the ones that promoted the inclusion of social considerations into the new legislation.

While the creative industries play an important part in the Chilean economy, it also has concerns in relation to the accessibility of works and wider copyright connected issues such as reading comprehension. Therefore, the newly incorporated exception for the benefit of libraries, teaching and educational purposes are a considerable step into the right direction. While the gains that can be derived from the creative industries are potentially able to benefit society if redistributed accordingly, this is a matter of public policy that could easily change. If these redistributive measures are incorporated into the legal framework, then there is a more long term assurance of their availability to the public even if policy concerns change. The balance between economic and social concerns that is

essential to embedded liberalism can therefore be reflected in the establishment and implementation of a copyright framework that protects the creator's interests and the integrity of his work, but also allows for access and distribution of knowledge and culture among all income classes of society.

While there is an increased complexity to be observed in relation to regional organizations, this can even more so be seen in relation to Chile, since it finds itself in a highly complex situation within the context of international trade, especially because it is not a member of regional organizations[53]. The generalization of a country's approach towards copyright protection merely on their economic status or on their short term policy proved only very limited insight. What can be seen from the case study of Chile is that, as an independently operating nation, it has to continuously struggle to provide sufficient consideration to the needs and preferences of its citizens, while also having to comply with additional treaties. This conflict is represented well in the fact that the US trade agreement required Chile to strengthen some areas of its copyright protection, while at the same time internally people requested the inclusion of exceptions and limitations into the legislation.

It has often been stated that developed countries have treated developing nations unfairly due to progressive value-added export tariffs and other "tricks" employed against some developing countries[54]. It is therefore no surprise that a country such as Chile has not been exempt from feeling these effects within its negotiations and international participation. There is an essential link between the general issues experienced by Chile in relation to international economic regulations and the specific issues of intellectual property legislation that it has to implement into its national legislation based on all the obligations it has entered into through international and bilateral agreements.

[53] "Liberlizacion del Comercio, Desarrollo y Politica Gubernamental", Ronald Fischer, 2001

[54] Among others this can be seen in the article referenced in number 2

Chapter 8

Comparative Analysis

The theoretical framework, which was developed in order to further the analysis and understanding of the issue of balance at the different levels of copyright protection takes into account several considerations. The concept of constitutionalization, as well as its sub-concept of institutionalization, is vital in order to understand the formation and implementation of copyrights in a legislative framework. The application of the central compromise of the embedded liberalist theory is essential in order to provide a foundation for the understanding of the essential connection and balance between economic and social concerns that is behind establishing a balanced legal (copyright) framework. In order to comprehend better the practical enforcement of a legal system, the theory of rights balancing and with it the application of proportionality, by courts was taken into account. In particular, the enforcement and interpretation that regional and national courts award to the competing interests as well as rights presented before them has a direct impact on the legal system and the different actors subject to it.

The interpretation of the theoretical framework was employed in order to test the principal hypothesis; namely that regional organizations, through their more specific harmonization of copyrights are more able to provide a balanced legal framework for their member states, by taking into account their particular needs and preferences. In order to analyse this hypothesis, first it will be asked whether there is any evidence of balance in the different legal copyright protection systems, using the concepts of constitutionalization and embedded liberalism to examine them. Then it will be inquired; what, if any, is the role of regional organizations in establishing and supporting this balance, particularly in relation to the examples of the Andean Community and the European Union? These questions were posed and considered in the three tiers of copyright legislation and

implementation, internationally, regionally and nationally. The following analysis will compare and examine the outcomes that have been derived from the previous chapters. First, a look will be taken at the question of balance in an international context and then the national provisions will also be analysed. Particular focus will be placed on regional organisations and on the manner in which they have shaped the translation of international legislation into the national laws of their member states.

International Setting

- ***TRIPS and Copyright Balance***

The importance of international, but also regional, constitutionalization and with it, institutionalization, lies in its ability to provide a stable and predictable legal framework. In addition, this has been seen as potentially providing a solution to the struggle that some countries face through increased negative impacts from trade because of the actions of another country, since it involves providing common rules and remedies for all participating states. At this crucial international level, however, there is a clearly evident lack of balance in the copyright legislation and particularly TRIPS, due to the lack of provision of a minimum standard of exceptions and limitations, which countries ought to use in order to provide the possibility of legitimate access to works. While recently some additional collaborations and treaties have been thought to improve the access to knowledge and culture[1], the system as a whole remains highly concerned and preferential towards the protection of the creator's rights, which are explicitly and obligatory for member states to incorporate into their national legal framework.

However, there is no similarly explicit and detailed obligation for member states to incorporate adequate exceptions and limitations in order to balance the system, taking into account the connection between economic and social interests as proposed in embedded liberalism. Rather, under TRIPS they have a general and unspecific flexibility to incorporate exceptions and limitations as they see fit. The perspective that constitutionalization and institutionalization have the ability to direct and protect important economic and social interests, has been repeatedly

[1] Such as the Doha development round and the Marrakesh Treaty

supported and illustrated in this research and exemplifies a close connection to the principles of embedded liberalism. This concept revolves around the embedding of social principles within economic markets, therefore preventing markets from being completely unrestricted in their operation and impact, as it would be under a more “laissez-faire” international legal trade structure. Especially in relation to copyright protection, this essential and complex function of the legislative framework has to be highlighted, as particularly here interests and benefits are competing with each other in the legal system.

The explicit wording of TRIPS Article 13 and WIPO Copyright Treaty Article 10, in using the expression the member states “MAY” incorporate exceptions and limitations for “certain special cases that do not conflict with the normal exploitation of the work”, clearly highlights the optional and much constrained nature of this flexibility. Member states might therefore have to make extensive and very wide reaching provisions for copyright protection, while they have to confine any counter-balancing measures to special circumstances. In addition, it can be seen from the discussion generated in response to Ecuador’s accession to the WTO, that the main concern of the international community was whether the national law made sufficient provisions for the protection of the creator’s rights, while little or no focus was placed on the available exceptions and limitations. This indicates the strong international focus towards the protection of copyright in terms of creator’s rights rather than taking into account the existence or establishment of a system that balances these rights against others for the benefit of equilibrium. The embedding of social preferences within a legislative framework, which supports trade and economic aspects, is essential for the legal structure to operate in accordance with its functions of providing legal guidance as well as certainty, efficiency and legitimacy.

This lack of an explicit and harmonized balance under international law and the rather one-sided support of the international system leaves the door open to abuses of power and cohesion between developed countries, with a strong interest in furthering their creative industries’ market against developing countries, who want to increasingly participate in international trade and therefore often accept provisions which go beyond their previous understanding of copyright protection and which might even have long term counterproductive effects on their social development. An example of this

is, for example, the trade agreement between Chile and the USA, which placed extensive TRIPS+ obligations unto Chile. Therefore, the essential compromise of embedded liberalism that allows social aspects to be incorporated into economic development, is not extensively reflected in the-international copyright legislation and although the increased constitutionalization and institutionalization has the potential to establish and interpret additional balancing rights in the future, it is important to highlight the current legislative gap and the need for action. In practice, it is also important to consider the role of the national and regional courts in evaluating and enforcing the legal provisions established, in order to assess and shape the direct impact legislation has on different actors in the economic and legal framework. Therefore, in order to analyse the presence or absence of balance within a copyright system, the concept and application of rights balancing by the courts, in terms of the concept of proportionality, is essential.

National Provisions

- ***Context of National Legislation***

The obligations assumed under regional and international treaties have a direct and indirect impact on the national provisions for copyright protection as well as their enforcement. The diverse background of countries that are subject to the international copyright framework is exemplified well through the countries examined in this analysis. On the one hand there are centuries of legal tradition that protect copyrighted works for the benefit of the rights holder, such as in the UK, while Ecuador has implemented forms of protection more recently and with the significant support of its regional membership. Chile's national legislation has not been shaped through regional collaboration; instead it is based on domestic interpretation of international law and bilateral treaty obligations. The recent evolution of the national legislative framework goes a long way in illustrating the different preferences and challenges faced by these countries, as well as exemplifying the progress made in relation to changing attitudes towards the balancing of economic and social aspects, within the developing legal framework.

It is important to understand that Ecuador has demonstrated a willingness to incorporate and enforce measures against piracy and illegitimate use, through laws and court decisions, therefore clearly being aware of the need and benefit derived from authors' remuneration and the safeguarding of their related authority over the work[2]. The specific entrepreneurial rights recognised and protected by Ecuadorean law[3] are very much similar to the ones protected in Chile[4] and the UK[5]. It is noteworthy that in Ecuador, different magnitudes of penal measures are available on the basis of whether, for example, the infringement was committed in order to gain a commercial benefit or whether it was done for private use[6]. In a country where many people struggle with some degree of poverty, these provisions are essential as it provides an understanding for those who infringe copyright out of necessity and without causing significant detriment to the rights holder and those who draw significant commercial benefit from their infringement and simultaneously cause significant harm to the rightful owner.

However, the formal recognition of rights is only the first step in order to have a reliable legal framework; these rights need to be enforced by national courts. Although the number of cases revolving around copyright protection in Ecuador is still limited, there are examples where the courts have upheld entrepreneurial rights[7]. This highlights once more the important role that national courts play in recognising and balancing different rights against each other, based not only on the legislative framework but also on the particular circumstances of the case[8]. Therefore,

[2] This is illustrated in cases such as CASO No. 0004-09-CN as detailed in chapter 6

[3] Articles 19 to 27, as can be seen in the summary contained in Chapter 5

[4] Articles 17 to 23, as summarized and explained in Chapter 7

[5] Articles 16 to 27 , as illustrated in Chapter 6

[6] Article 319 to 331of current legislation

[7] Another important aspect for the protection of intellectual property is enforcement at the border to stop pirated goods entering or leaving the country, here international and regional frameworks also play a role; see "Las Medidas en Frontera en el Ecuador", Natasha Bluztein & Nélson Yépez Franco, 2011 (Propiedad Intelectual Tomo 4)

[8] For example see, Resolución del Tribunal Constitucional 270 Registro Oficial Suplemento 188, 10-oct-2007, as summarized in chapter 7

this also exemplifies the important role that the principle of proportionality with rights balancing has for courts to apply the legal framework in a manner that takes into account the different social and economic interests that are also part of the embedded liberalist compromise.

The origins of the UK's previous legislation are much more deeply rooted in a national understanding and interpretation of creator's rights as well as the requirement of providing remuneration and authority in relation to the works[9]. As mentioned before, UK copyright law is considered one of the first formal pieces of legislation on the protection of copyright[10]. Important provisions are also established under UK law for the protection of entrepreneurial rights[11]. This exemplifies the emphasis placed on the safeguarding of protected works against any kind of infringement and through this ensures that corresponding remedies and punishment are available in the case of any such infringement. In recent years, the UK included some changes into national law in order to implement European Union directives and decisions which are also binding upon it[12]. Similar to Ecuador, the national legislation has experienced changes due to the harmonisation of legislation at a regional level, once again exemplifying the potential that regional organizations have in creating and strengthening a legal structure which takes into consideration the different needs and priorities at stake for the actors involved in regional and national markets.

For Chile, on the other hand, some of the most profound changes can clearly be linked to the trade agreement with the USA[13]. The strong emphasis on rights holders' protection can not only be found in the legislation of Chile, but is also visible throughout the case law and the

[9] Please refer to explanations contained on the onset of Chapter 6

[10] Statute of Anne 1709

[11] under Articles 28 – 56 and summarized in Chapter 6

[12] The structure of how European legislation ought to be carried through in UK legislation is well explained in "EC Law in the UK", Christine Boch, 2000

[13] For instance these include the increase in fines and penalties for copyright infringements as well as the specific regulations concerning internet service providers. A rather detailed analysis of the trade agreement between Chile and the USA can be seen in: "Bilateral agreements and a TRIPS-plus world: the Chile-USA Free Trade Agreement", Pedro Roffe, 2004, (TRIPS Issues Papers 4)

courts' favour of creator's rights against others put forward for its consideration[14]. The courts have repeatedly upheld the economic and moral rights of the rights holder, therefore making it clear that these are recognised and protected through national law and enforcement and that there are only very limited circumstances in which these rights do not take the higher ground during their balancing against other rights. The balancing of rights and interests by the courts, in the context of proportionality, is therefore in this particular case study more geared towards the support of the creative industries and derived economic benefits. The tendency of very wide reaching and strict copyright protection cannot only be considered to originate from an independent national preference, but rather is also heavily shaped through the wishes and needs of international cooperation as well as trade openness with many partners[15].

Apart from the international and regional recognition of the creator's rights, it is also important to see how they have been carried through into national legislation and case law, since this is where their impact is felt most directly by all the actors involved in copyright related activities. The argument in favour of the specific hypothesis, that regional organizations play an important role in the establishment of their member countries' protection, can only be assessed if the national legal frameworks are considered in terms of balance and incorporation of related preferences. Therefore, the application of principles of embedded liberalism and proportionality by the national institutions is important in this context. It can be seen that, despite the fact that Ecuador joined the WTO and therefore TRIPS at a later stage than Chile and the UK, the protections awarded under its national law conform with the international standard and it has also shown itself to value the importance of the creator's rights through the enforcement in case law, against piracy and illegitimate use of works. This recognition and protection of the creator's rights is even more evident in the legislation and case law of Chile and the UK, which both support creative expansion and the creative industries that are important for their national markets. While it is important that all of these countries recognize

[14] See for instance Case 3.788-2009as summarized in Chapter 7

[15] This can be observed when considering the many different trade agreements that Chile is subject to and some of which were explained in Chapter 7

entrepreneurial rights, therefore ensuring adequate recompense and giving possibilities for the creation of further knowledge and art, they also protect and highlight the importance of moral rights to ensure the safeguarding of an author's works' integrity[16].

- ***Evidence of balancing on a national level***

The protection of creative works is an important part of national law, due to the recompense, security and motivation it awards to the creators and the national market both in the sense of economic gains as well as for the protection of creative interests. However, in as much as copyright can be of benefit for individuals and the national economy, it is important to bear in mind that these grant some sort of monopoly rights to the works and therefore also limit access to and availability of knowledge, creation and culture. This requires legislators to have an awareness of the potential gains and losses that can be promoted depending on the way in which these rights are enacted and enforced as well as considering the social needs and preferences that are paramount to national growth and social development in the long term.

It has been seen that entrepreneurial rights are protected by Ecuadorian domestic law and are upheld by national courts[17], in line with regional and international provisions. The legislation in Ecuador makes quite extensive provisions for applicable exceptions and limitations under Article 83[18]. These exceptions use the frame and flexibilities established under the Andean Community Decision 351 and .Article 13 of TRIPS[19]. From the legislative perspective, Ecuador has established exceptions and limitations which are commonly incorporated into copyright frameworks;

[16] Graham Dutfield has made some critical statements as to the approach that has been employed by the EU and US in order to secure stronger protection from trade partners. See: ""To copy is to steal": TRIPS, (un)free trade agreements and the new intellectual property fundamentalism", Graham Dutfield, 2006, Journal of Information Law & Technology - Chile's situation is one example of the impacts that this approach can have.

[17] Moral rights are also upheld by courts and legislation. This can be seen in the previous chapter 5.

[18] As implemented in the current legislation and summarized in chapter 5.

[19] Please refer to Chapters 3 and 4 for a detailed explanation of these flexibilities and provisions, particularly the sections concerning Ecuador's situation.

however, it is questionable to what extent these exceptions are able to support and promote the social objectives that Ecuador has often declared to have at the forefront of its interest[20].

Just as it is important whether the entrepreneurial rights of copyright owners are enforced, a balanced system must also enforce the rights of the user through the recognition of legitimate exceptions by the courts. The issue of exceptions and limitations has been taken into consideration by the national courts in Ecuador in a variety of cases[21]. In the legal system, the burden of proof is on the side of the copyright owner to establish that there has been an actual infringement. In one particular case, it was made clear that in order for there to be a violation of the author's copyright two conditions need to be fulfilled[22], namely that the work is reproduced by someone else other than the author and that this person claims the work to be his own. These aspects taken into combined consideration show that the legal system not only considers the economic benefits that can be drawn from the creative industries, but instead also aims to provide legitimate access to knowledge and culture as well as a recognition of user rights to its people. The courts are guided into a situation where there is a clear emphasis on balancing the rights of both parties in a copyright dispute. This enables the national courts to take into account legitimate social and situational aspects when coming to a decision, through the application of the principles of proportionality and embedded liberalism. It is also important to recognize public initiatives which support the accessibility and spread of knowledge and culture among the people, as this further illustrates a commitment to improving the balance of the copyright system in practice[23].

[20] Several speeches given over the last decades in the international and regional arena demonstrate Ecuador's strong emphasis on social concerns, please refer to chapter 3 and 4 for according summaries

[21] For example Expediente de Casación 71 Registro Oficial 366which was summarized in chapter 5

[22] See cases summarized in chapter 5, for example :Expediente de Casación 71 Registro Oficial 366 de 29-jun-2004

[23] "There are initiatives to digitize works from public and private libraries, for the dissemination and preservation of the national production of books, respecting copyright. To cooperate with these initiatives, the three author's copies delivered for registration of their works, the National Central Library, SINAB, and libraries for Distinguished Municipalities of Cuenca and Guayaquil are sent. As well

By comparison, the UK courts have balanced the established entrepreneurial rights and the corresponding remedies in a multitude of cases over the course of the last centuries[24]. One might argue that the extensive protection of entrepreneurial rights through legislation and case law not only sets boundaries to keep unwanted access out, but simultaneously restricts creativity somewhat, since the opportunity to examine and use existing works is also limited. It is logical that access to knowledge and primary creative resources is essential for the development of new ideas. When this is too restricted, only a select number of people will be able to use them and therefore the danger is that new ideas and concepts are more difficult to evolve[25] or are only being evolved by a selected and limited group of people, therefore potentially inhibiting creative diversity. It[26] has been argued that it might be beneficial for some areas of research and development in intellectual property to be more competitive in order to generate more market-friendly solutions. This argument is based on the danger that any kind of monopoly and the financial security connected to such protected intellectual creations causes industries and authors to be less productive. Knowledge in the majority of science and social science doubles every few years and theories are ever evolving as technology enhances our understanding. We therefore live in a world where fast access to knowledge and currently relevant materials is essential in order to propel us forward, not as individuals but as a human race.

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as three copies that are received in the registry as legal deposit, delivers one of the "Eugenio Espejo" National Library, and two to the Library - Authors Archive Ecuadorian "Aurelio Espinosa Polit," according to the Law". This was recognized and highlighted by WIPO in the Regional Office Directors Meeting on Industrial Property and Copyright Offices of Latin America, organized by the World Intellectual Property Organization (WIPO) in cooperation with National Institute of Industrial Property (INPI) in Argentina and the National Copyright Ministry of Justice and Human Rights of Argentina , Buenos Aires, May 30 to June 2, 2006 page 3

[24] See for example the cases that were summarized in chapter 6

[25] The logic that the protection of entrepreneurial rights is safeguarding not only the property rights but also the human rights of the author has been argued by several authors, a good summary of the underlying rational is "Human rights and copyrights: a look at practical jurisprudence with reference to authors' rights", Simon McBride Newman, European Intellectual Property Review, 2009

[26] Please refer to chapters 1 and 2 for an overview of literature in this context and copyright balance.

It can be noted that, while in the UK there is protection awarded to rights holders' interests not only in the form of economic rights, but also more importantly to their moral rights, there are also exceptions included in the current legislation[27]. These include, among others, exceptions which to some extent overlap with those established under Ecuadorian legislation[28]. However, it is questionable how useable they are in reality, particularly taking into consideration that within the extensive amount of UK case law, there are not many cases actually considering the issue of exceptions and, when they have been taken into account by the court, they have only been upheld under very narrow circumstances[29]. This could be interpreted as illustrating a certain unwillingness of the courts and the legislator to give way within copyright protection for the users' interests[30]. Such an approach would be a dangerous strategy, as the evolution of law and legislation should not only be shaped by industry and traditional forms of protection, but rather it should act as an entity for the benefit of the people and the evolution of time. What can be seen from this comparison is that the embedded liberalist compromise and the issues of rights balancing in proportionality are rather one-sided when applied in practice by legal institutions in the UK.

In relation to Chile, it is a conflict that simultaneously led to the introduction of specific exceptions into the new legislation, which ought to improve user access. Stronger remedies and penalties were also implemented, again putting weight on the side of the protection of rights holders[31]. The underlying motivation can be found in the economic contribution that the state gains from the creative industries.[32] The annual

[27] under Articles 28 to 56, as explained in chapter 6

[28] For instance in relation to libraries and teaching materials, as can be seen from chapters 6 and 7

[29] An example of a case considering exemptions is Sony Music v. Easy Internet café, as summarized in Chapter 6

[30] The importance of protection cultural diversity in particular in relation to the music industry has been looked at in "Culture and the digital copyright chimera: assessing the international regulatory system of the music industry in relation to cultural diversity", Johnlee Scelba Curtis, International Journal of Cultural Property, 2006

[31] See for instance articles 80 to 85 of Chiles current legislation

[32] Please refer to the explanations and statistics presented in chapter 7

income received from this sector makes it one of the largest within Latin America, therefore putting Chile into a comparable situation with the UK which also has a very active creative industry sector[33]. The balance that is aimed for in a legal framework is more difficult to achieve; the wider the range of different obligations and motivations that ought to be combined[34]. This can be seen beyond a doubt in the Chilean example. While some international obligations, enshrined in bilateral treaties, pull it towards even stronger protection[35], other voices call for a more balanced system benefitting rights holders and users more evenly[36]. This difficulty is evident both in the legislative framework and the need to embed social aspects with economic ones under the principles of embedded liberalism, but also in the practical consideration by the courts and their approach to proportionality and rights balancing.

For Chile, the aim of combining such opposing interests and forces is nearly impossible, since other international and bilateral treaties also have to be respected. In addition, this places a strain on the national courts in their role of considering and balancing competing rights. In the past, courts have favoured an interpretation which heavily favoured the protection of the creator's rights[37], while only taking very limited legitimate exceptions into consideration[38]. What must be remembered is that mere words on a piece of paper do not mean a thing without the due enforcement and respect awarded on the basis of understanding and fairness to all parties concerned.

[33] Please refer to the explanations in Chapter 6

[34] Some Arguments have been brought forward that regional directives, for example in the EU are not always the correct answer either, for a recent piece on the challenges of piracy look at; "The amended Digital Economy Act 2010 as an unsuccessful attempt to solve the stand-alone complex of online piracy", Krzysztof Garstka, International Review of Intellectual Property and Competition Law, 2012

[35] Like for instance the trade agreement with the US

[36] For instance WIPO declaration that countries ought to establish adequate exceptions and limitations referred to in chapter 3

[37] See for examples the cases summarized in chapter 7

[38] Please refer to cases summarized in chapter 7, for example Fallo: 3.788-2009, Fallo : 2.077-2008 and Fallo : 4.898-2008

In contrast to the continued strengthening of protection measures, Chile has stated in the preamble of the new legislation, that it considers intellectual property "to ensure public access to artistic and cultural creations and knowledge products". This aim had not been reflected in the previous law, which was extremely weighted towards the protection of the rights holder without making any useable provisions for the legitimate access to knowledge and creations that is so essential for the evolution of culture and development. In an attempt to somehow balance the copyright system, a variety of new exceptions and limitations have been included into the modified Chilean legislation[39]. It remains to be seen how successful these provisions can be, since until now the Chilean courts have made rare reference and even rarer acknowledgement of exceptions within the cases brought before them[40]. The fact that the burden of proof is placed on the defendant, rather than on the appellant, illustrates the importance of the legal structures and that the court's application is somewhat sided towards the protection of the author's rights and interests and stands in contrast to the situation previously explained in relation to Ecuador, where the burden of proof is placed on the plaintiff. In the first situation, it is the rights holder's responsibility to prove that they are entitled to damages because an infringement took place, while on the other hand the defendant has to establish that no infringement took place. [41].

What has to be remembered is that there is a problem of the benefits of trade being distributed unevenly across the international market, which also indicates that some state actors are able to better exploit the international framework in order to monopolize their power and place emphasis on their own interests[42]. Awareness of the importance of the

[39] An interesting analysis that relates particularly to technical protection of works and exceptions and limitations relating to these can be seen in "Excepciones y Limitaciones al Derecho de Auto en Relacion a las Medidas Tecnologicas de Proteccion", Maria Paz Canales y Maria Pilar Soffia, Revista Chilena de Derecho Informatico

[40] Potential of exception or excuse for copyright infringement denied in case 3.788 - 09

[41] See for example the reasoning of the court in *Case 2077 - 2008* summarized in chapter 7.

[42] See for instance the explanations contained in: "The Corporate Connection", John Gerard Ruggie, 2008 and "To copy is to steal", Graham Dutfield, 2006

particular legislative provisions and their impact not just on a legal but social framework is paramount for countries in order to adequately balance their copyright law in accordance with their needs and preferences in order to be able to counteract the negative aspects from globalization on a national level[43]. The continued development and growth of the understanding of the essential interconnection between legislation, trade and social aspects is important for a country's ability to employ the flexibilities awarded under the international system in best concordance with the priorities and preferences it has set[44]. This aim to balance the varying interests of member states is also essential to regional organizations, in the context of regional constitutionalization, embedded liberalist compromise between different preferences and the proportional balancing of rights of diverse interests. However, in the international as in the regional system, differences can be found in the implementation and case law[45].

The importance of balance within the copyright system is more highlighted in some countries than in others and accordingly the provisions and applications employed vary, depending on the individual nation's preferences. From a legislative point of view, in terms of the established exceptions and limitations, some provisions are quite similar between Ecuador, Chile and the UK, since, for example, they incorporate exceptions for libraries and educational purposes. However, in practice, it can be seen in these three case studies that the Ecuadorian courts and institutions are more inclined to consider potentially applicable exceptions than in Chile and the UK, where these considerations are often dealt with rather dismissively by the courts. In addition, there are supportive measures within Ecuador designed to further access to knowledge and culture by the public, and therefore support the social objectives it often has declared to be of such vital importance. These institutional and supportive measures reflect the understanding that markets require some legitimization through their

[43] "Globalization and the Decline of the Welfare State in Less-Developed Countries", Nita Rudra, 2002

[44] "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi Abdelal and John G. Ruggie

[45] Please consider the explanations of the previous chapters

reconciliation with social values, as proposed in constitutionalization and embedded liberalism. However, this is true not only in relation to Ecuador but also applicable to Chile and the UK, where the importance of the copyright industries is supported by legislative provisions and enforcements, while these are often not legitimized by a consideration of the availability and support of balancing rights.

Regional Organizations and Copyright Balance

- ***The Role of Regional Organizations***

The countries which have been selected for this analysis (Ecuador, Chile and the UK) provide a set of information and primary data that exemplifies the impact of regional organizations on one side and bilateral treaties on the other. This contrasting and comparative structure of the analysis is essential in order to test the hypothesis against different sets of case studies, which then provides an insight into different approaches, thereby filling a knowledge gap in relation to the particular relationship that exists between one level and the other. The logic of harmonization is based on the idea that it "provides the necessary flexibility to adapt the rules to the prevailing state of the market and the desired degree of protection by each contracting party"[46]. The increased constitutionalization of the regional framework is an important tool of this harmonization, since it provides a stable, predictable and unified legal basis for regional institutions and national implementation. It also has the benefit of being more detailed and considerate towards the particular regional situation as well as providing more security and reliability for the actors involved. Embedded liberalism is also a concept which takes into account the utility of some forms of light protectionism, as it may be employed by regional organizations to safeguard their members' preferences. At the same time, the application of social and economic considerations, in line with embedded liberalism, is also able to be better reflected in regional legal texts and regional courts' interpretation. The emphasis on the balancing of different rights through the

[46] "Unification and Harmonization of Law Relating to Global and Regional Trading" G. A Zaphiriou, 1994, page 15

principle of proportionality also guides member countries' practical interpretation and application of the legislative framework.

Regional organizations are essentially based on both a top-down influence of supranational institutions and legislation (such as regional courts and commissions), which influences national implementation region wide, while simultaneously national representatives are expressing concerns and shaping policy through intergovernmental and democratic participation (through a regional parliament for example)[47]. This is a similar dynamic in much of international constitutionalization and institutionalization, as increasingly open markets (both regionally and internationally) require more legislation and administrative institutions to establish and implement these strategies[48]. However, regional organizations have one particular advantage in contrast to the wider international collaboration, as their members are mainly united by common goals and concerns[49], therefore providing a forum for these particular interests to be taken into account when regional legislation is drafted and implemented by institutions and courts.

This is particularly relevant when considering copyright law and the essentially competing interests between the rights holders and those requiring access, depending on a country's dependency on either the creative industries or the need for social development. The increased legislation and institutional framework that regional organizations establish for their member states has an increased consideration for their particular preferences and needs while simultaneously providing a cross-border framework that allows increased predictability and stability for the open market exchange of culture, knowledge and goods. It is important to remember that the community law has direct and preferred applicability in relation to national legislation, as it also facilitates the legal developments that arise in line with economic integration "in a world that every day

[47] See the points made in chapter 2 and also refer to "Deliberative Democratic Theory" Simone Chambers, Annual Review Political Science, February 2003

[48] Please refer to chapter 3 and particularly

[49] Chapter 3 in relation to the motivations of the Andean Community, but similar understanding can be seen within the EU as well.

becomes more international"[50]. While these attributes are more evident in the relatively long existence of the EU, their essence can also be observed in the Andean Community and both illustrate the importance of harmonizing and centralizing legislation in some form of constitutionalization while also considering the balancing of these laws depending on circumstances and preferences.

The essential link proposed under embedded liberalism[51] between trade and social purposes is also particularly evident in relation to regional organizations, as they are prompted by the expectation that regional trade and collaboration will lead to increased economic and, in turn, social development for member states. These connections have an impact on the provisions of copyright law, as member states do not only consider international agreements, but also a more specific harmonisation for the benefit of lowering trade barriers at a regional level. When considering the ability and possibility to create and enforce a copyright framework which balances different rights and interests through the application of embedded liberalism and proportionality, the potential to have regional needs taken into account is huge. For example, the need to consider balances that help to spread knowledge though education and combat illiteracy at a regional rather than a national level can bring more widespread benefits. In addition, the lack of harmonisation of exceptions and limitations region wide brings uncertainty and restrictions for the utilization of works, since one country might have an exception for development of culture and knowledge, while a neighbouring country does not. This brings unnecessary difficulties in relation to creative and scientific collaboration between countries. It is also an important factor that the more legal and social stability as well as education is found in a region, the more investment is attracted and the more purchasing power is developed by the population. Therefore, these considerations of copyright protection have an impact not only on the social

[50] This is well examined in "Teoria Juridica de la Integracion Latinoamericana", Ricardo Schembri and also consider "Libre Competencia y Liberalization Desafios para la Integration en America Latina", Aldo Gonzalez and Sergio Espejo, article based on a presentation given at the Seminar on "Emerging Issues for Latin America 2015 - 2020" organized by CIEPLAN, 2013

[51] "Reconstructing Embedded Liberalism: John Gerard Ruggie And Constructivist Approaches To The Study Of The International Trade Regime" Andrew T. F. Lang, Oxford University Press 2006

development of a region, but also the economic growth from research, creativity and culture and exemplify a vital connection to the embedded liberalist compromise.

This promotion of regional stability and collaboration is more important now than for a long time, since the recent years of economic crisis have made it increasingly difficult for one nation or another to act as a hegemonic power[52] on the international stage and protectionist measures of markets are likely to increase if regional and international organizations fail to continue to support the shared social and trade purposes they subscribed to[53]. The essential ability of regional courts to apply and interpret the legislation of the regional organization and its member states in line with the economic and social preferences established, is vital for guidance and provides predictability to the actors involved in the regional market. In practice, it can be seen that the EU now goes much beyond a simple economic arrangement between countries, instead it also influences the social and political operations of its member countries. Its origins as the European Coal and Steel Community have over the last six decades grown into something much more complex and interdependent.

[52] Lang explains that the hegemonic stability theory sees the international economic regime as being closely related to the prevailing distribution of power and that if that power is assigned to liberal trade principals the result will be an open trade structure. However, if the hegemonic power should decrease this results in a weaker and more protectionist trade structure. The investment into social goods and development that a hegemonic power provides would then no longer be available. This basic summary is made by Lang on page 3 of his article.

[53] The softer versions of protectionism which are to be expected to some extend within the concept of embedded liberalism, can be compared to the protectionism demonstrated by regional organizations towards non-member states or partners, designed to strengthen and develop the internal market on the basis of corresponding regional and national legislation as well as implementation. “International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order”, J. G. Ruggie, 36 (2) International Organization 379 (1982). at page 228. Ruggie develops this argument in later articles for instance in “International Organization: a State of the Art on an Art of the State”, J. G. Ruggie and F. Kratochwil,, 40 (4) International Organization 753 (1986); “Embedded Liberalism Revisited”, J. G. Ruggi in E. Adler and B. Crawford (eds), Progress in Postwar International Relations, (1991) 202, “Globalization and the Embedded Liberalism Compromise: The End of an Era?”, J. G. Ruggie in W. Streeck (ed.), Internationale Wirtschaft, Nationale Demokratie, (1998); “Taking Embedded Liberalism Global: The Corporate Connection”, J.G. Ruggie in D. Held and M. Koenig-Archibugi (eds), Taming Globalization: Frontiers of Governance, (2003).

There is an extensive body of work which looks at the particular relationship of the UK with the EU in relation to general policy and decision making[54] The EU directives establish the stable and predictable setting for the protection of the creator's rights and interests[55]. These provisions can be seen as particularly important to the UK economy[56]. The economic gain derived on the basis of these laws does not only benefit the rights owner, but also benefits the European economy as a whole through taxes and investments resulting in it being one of the three world-wide leading economies in relation to holding copyright for audio-visual, software, editorial and musical works[57]. The focus of current regional legislation is very much on the protection of the works, while many EU countries (including the UK) make provisions for some exemptions, there are no regionally binding exceptions that have to be implemented[58] and the main regional focus is the protection of income and economic growth from the creative industries[59].

This also highlights how the particular trade concerns and preferences within a regional organization shape the legislative framework

[54] "The foundations of European Community Law" T.C. Hartley, 2003 - "Britain and European Integration since 1945", Gowland, Turner & Wright, 2010 - "EC Law in the UK", Christine Boch, 2000 It has played a special tune, while financial and policy considerations kept it out of the union for several decades, its accession did not mean a complete surrender to the European ideals, this is exemplified in its rejection of a monetary union in favour of its own financial and investment sector. As explained in "Britain and European Integration since 1945", Gowland, Turner & Wright, 2010, page 24

[55] Please refer to explanations made in chapter 2 in regards to embedded liberalism and constiutionalization

[56] "Commission sets out "blueprint" for Intellectual Property Rights to boost creativity and innovation", EC press release, Brussels, 24/5/2011

[57]" Intellectual Property Provisions in European Union Trade Agreements - Implications for Developing Countries", Maximiliano Santa Cruz S., ICTSD Programme on IPRs and Sustainable Development, June 2007

[58] For instance see EU directive on the harmonization of copyright protection (Directive 2001/29/EC of the European Parliament and of the Council, of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society) incorporates under article 5 (sections 2 and 3) a list of exceptions with member states may incorporate into their national legislation, but only provides the obligation of member states establishing an exception for the accidental inclusion of a work.

[59] The amended 2006 Directive refers to an exception for phonogram sales but this only applies in very limited circumstances.

in which the regional institutions and private actors operate. It is beneficial for major EU member states, such as the UK, to have strong regional copyright protection as this promotes the export, distribution and creation of associated products region wide[60]. On the other hand, there are some possible exceptions which aim to promote a kind of balance for those with a legitimate need to access these products, for example for libraries and educational purposes. This leads to a situation in the EU, where the author's rights are regionally protected and are predictable and reliable to act upon, while the exceptions and limitations for users are much more dependent on national preferences, making them less reliable at a regional level.

More specific regional legislation would be necessary in order to provide adequate regional consideration and enforcement of rights as well as protection against the abuse of power granted as part of monopoly copyrights. This can be achieved through the establishment of a common legislative foundation for these rights and through regional courts giving interpretation assistance and guidance to national courts in terms of the upholding of such balancing rights within their national jurisdiction[61]. Specifically, the role of regional courts in balancing competing rights and interests against each other is essential, since the way in which these rights are interpreted and valued has a direct influence on the way in which member states' institutions and courts consider these rights. This is due to the operation of the principle of direct effect and the system of consultation between national and regional courts within the EU system[62].

Therefore, the importance of embedded liberalism in considering the connection between social and economic interests as well as the balancing of rights against one another as part of the courts' utilisation of

[60] " In 2000, European Heads of State established the strategic goal for the EU of becoming the most competitive and dynamic knowledge-based economy in the world by 2010. Innovation was recognized as the key to the success of this strategy, which today is commonly referred to as the Lisbon Strategy or Agenda". As stated in "Intellectual Property Frontiers - Expanding the Borders of Discussion" a Stockholm Network Publication, Edited by A. K. Jensen & M. P. Pugatch, 2005

[61] "EC Law in the UK" Christine Boch, 2000, for example refer to pages 29,58 and 154

[62] ECJ case C-70/10, Scarlet Extended SA V Societe belge des auteurs, compositeurs et editeurs SCRL (SABAM), summarized in Chapter 8

proportionality should not be underestimated in relation to the provision of copyright balance. The increasing social considerations of the EU have developed step by step over a period of time; the essentially economic considerations have been the starting point but now they need to be complemented by social ones[63]. The practical balancing of rights is the vital connection between the concepts of constitutionalization in its function of providing an operational legislative basis and the principles of the embedded liberalist compromise as to how economic and social needs are (and should be) inter-connected.

In comparison, the Andean Community was created with the motivation of improving the standard of living for their people by focusing on regional integration through economic and social cooperation, while simultaneously decreasing the external vulnerabilities each of the participating states was subject to. Although it is considerably younger than the EU and some of its processes are not as fine-tuned as in a longer established regional organization[64], it is still one of the oldest unions in Latin America. From the very beginning, the Andean Community had the social development of its member states as an essential aim of the increased trade and cultural exchange between its member states, which can be contrasted against the mainly economic motivations of the EU beginnings. The Andean Community places a strong focus on the historical and cultural aspects as well as joint objectives which these countries have, in order to establish a basis for cooperation. At the same time, all of these countries are characterised by a wide cultural, ethnic and linguistic variety[65]. The pillar of regional integration is not only the harmonization of legal principles and institutional frameworks, which are employed for the benefit of economic development, but this integration also aims towards social stability, therefore reflecting an essential attribute of both embedded liberalism and constitutionalization[66].

[63] See the increasing socialisation of EU legislation, from European coal and steel treaty, over Rome convention and the European charter on human rights.

[64] Please refer to chapter 3 for the specific consideration of Andean Community regional constitutionalization and institutionalization.

[65] Please refer to the explainations made in relation to CAN in chapter 4

[66] This is well examined in “Teoria Juridica de la Integracion Latinoamericana”, Ricardo Schembri

The extensive institutional framework of the Andean Community is one of its essential attributes in promoting a stable regional integration, since this institutionalization ensures not only legislative formation and enforcement but also promotes accessibility and guidance towards member states and their citizens[67]. In particular, the role of the Andean Community court should not be underestimated as its rulings and interpretations are an important source of member states' understanding and interpretation of legal rights and how they ought to be balanced against each other. Some of the Andean Community's member countries had limited previous experience with international copyright legislation before the formation of the regional organization.

This can be contrasted against the UK's position which had home grown much of its copyright protection prior to the formation of any international treaties in this area. The role of regional organizations in provoking developments in national legislation[68] can be clearly observed in relation to the Andean Community and the copyright law applicable for its member states, including Ecuador. Contrary to the UK, the formal recognition of copyright protection within the Ecuadorean legal system took place rather more recently and the influence of the Andean Community in shaping the understanding of this legal principle is much more evident. When Ecuador had to explain its copyright framework upon accession to the WTO, it made explicit reference to the regional legislation as a legal source that is binding and guiding upon its national system[69]. As a result, this reference and the additional security placed on regional legislation can also be understood as ensuring the compliance of national legislation with international standards.

[67] Please refer to chapter 5 on a detailed explanation of Andean Community institutions and also consider Teoria Juridica de la Integracion Latinoamericana", Ricardo Schembri Carrasquilla, Latin American Parliament, Sao Paulo, 2001

[68] As seen as a possible motivation for regional collaboration in "The Economic Implications of Uniformity in Law", Souichirou Kozuka, 2007, page 6

[69] See Ecuador's response to questions asked by the EU and Japan in relation to its copyright framework when it acceded the WTO, a summary of which can be found in chapter 6.

Decision 351 of 1993 establishes the binding principles of copyright protection for all member countries of the Andean community. While some of these countries might already have been signatories' to international or bilateral agreements which required them to have provisions for copyright protection[70], this decision aimed to harmonise the legal approach and understanding across the regional member states. The essential provisions which were established by this regional legislation are greater in detail than the international legislation, so as to enable supra-national interpretation and enforcement of rights[71]. The understanding of how best to implement and apply the international and regional copyright framework is different based on the experiences and needs that are experienced by one country or another. Certain flexibilities are therefore still available to regional member states in the way in which they choose to implement rights. What can also be seen from this comparison is that, when looking at regional harmonization of copyright protection, different influences are at work, which shape not only the formal implementation, in line with the concepts of constitutionalization and embedded liberalism, but also the interpretation, through courts' and institutions' application of proportionality, in relation to such legislation.

In order to appreciate the role of the Andean Community in shaping national law, it is useful to take a look at Ecuador's previous national statutes for the protection of copyright and to contrast these with the wide regional and international requirements. The basis for Ecuador's legislation on copyright protection being up to an international standard can largely be attributed to the influence of the regional organization. Ecuador was required to implement the respective protective measures years prior to acceding to the WTO. The comparison between Ecuador's 1950's,1976 and current copyright law shows that national legislation has slowly developed to an international standard of protection, while already implementing regional requirements, such as the provisions under Decision 351 in relation to creator's rights, neighbouring rights and applicable exceptions.

[70] Like for example the Washington, Berne or Paris Conventions

[71] See for example the relationship between the Andean Decision 351 and Ecuador's copyright legislation explaned in chapters 4 and 5

The aim of increased harmonisation in order to facilitate trade, stability and predictability of legal frameworks observed by the regional organization's approach can be sharply contrasted against the multitude of bilateral agreements entered into by Chile[72]. Yet, Chile is considered an advocate of trade openness in Latin America due to its intense strategy of tariff reductions and elimination of non-tariff barriers as well as its relatively active role within the international framework[73]. The legislative commitments entered into by Chile, under so many separate agreements, are striking. While regional organizations aim for a harmonized implementation of international legislation by their member states, Chile has found itself subject to having to adapt its national framework in accordance with many separate trade agreements and, at times, extremely extensive and conflicting commitments, particularly in relation to the provisions for copyright protection[74]. Although some of these treaties also contain provisions for cooperation between the signatory countries and collaboration on matters besides purely economic cooperation, this embeddedness is not as explicitly and widely established as under the mentioned regional organizations.

This contrast between the countries of this analysis highlights the essential role that regional organizations play through the harmonization of copyright protection and the related enforcement through their institutions for the benefit of cross border trade and legal predictability for investment[75]. These benefits are not only enjoyed by the member states of regional organizations but also make outside investments and cooperation more reliable, due to a common legal basis. Based on such observations, a

[72] Arguments against Chile's participating in regional organizations can for instance be found in "Liberalización del Comercio, Desarrollo y Política Gubernamental", Ronald Fischer, 2001

[73] Explanations to this effect have been made for instance by Schembri in his article, "Teoria Juridica de la Integracion Latinoamericana ", 2001

[74] Please refer to the summary of copyright requirements of some trade agreements in chapter 7

[75] The benefits of harmonisation in general have been looked at in papers like: "The Futility of Unification and Harmonization in International Commercial Law", P.B. Stephan, 1999 - "Unification and Harmonization of Law Relating to Global and Regional Trading" G. A Zaphiriou, 1994 - "The Economic Implications of Uniformity in Law", Souichirou Kozuka, 2007

harmonised legal copyright system that balances social and economic interests with each other, as in a regional organization, ought to be preferred over the potentially conflicting responsibilities entered into through an overly extensive network of bilateral treaties. While international frameworks also aim to provide similar benefits through a unified system[76], regional organizations count on the more detailed implementation and crucially the more accessible supra-national enforcement possibilities of regional courts[77].

It is therefore important to consider Chile as an example of how countries might participate in international trade without the guidance and unified obligations of a regional organization. While it is true that member states of a regional union might still agree to bilateral agreements, the obligations under regional legislation would always have to be respected[78]. Chile is not bound by such constraints, but it is under the obligation of fulfilling all of the distinct commitments entered into during such individual negotiations. In terms of legislative harmonization, this provides a clear contrast to the more stern and predictable legal framework of regional organizations, such as the EU and the Andean Community. The issue with this form of regionally independent framework is that it only provides limited legal long term foreseeability and security for the actors involved, since the conclusion of a treaty could potential affect the entire legislative structure[79].

Apart from this lack of harmonization affecting the legislative and institutional structure itself, there is also an effect on how the state is able to provide a connection and balance between trade and social considerations. This reflects not only an effect on the constitutionalization of the legal framework, but also on the interpretation of embedded liberalism and the rights balancing of proportionality. Although Chile apparently has more

[76] Declared aim in many of the preambles of international treaties such as GATT and TRIPS

[77] "The foundations of European Community Law", T.C. Hartley, 2003, page 10

[78] Please see previous explanations as to the supremacy of regional legislation contained in chapter 4

[79] This is comparable to the great impact the free trade treaty between Chile and the US had on Chiles national copyright framework, please refer to Chapter 7 for a more detailed explanation.

freedoms and flexibilities which in theory it could use for the stabilization and promotion of social safeguards, in practice, it has to please many different partners with the implementation of obligations into national law. The danger is that, for the benefit of increased economic openness and gains, national social needs in relation to the access, distribution and creation of knowledge might not be taken into as much consideration as they ought to[80].

What is also evident from the very varied provisions entered into by Chile is that the harmonization of regional legislation not only makes things easier for trade between member states, but also simplifies the obligations and structures that need to be implemented on a national level. In addition to this, the increased need to defend common goals is also a potential protection of the regional interests against excessive foreign influence[81]. To some extent, the excessive use of such agreements could be interpreted as being counterproductive to the aim of TRIPS to harmonise legislative protection for IP law internationally. While regional organizations support benefits such as predictability and stability through harmonized legislation, Chile is able to independently change its laws, but it also has to be considered that there are several stages for the implementation of bilateral treaties[82] and the simultaneous enacting of a variety of agreements in different phases of adaptation clearly does not represent medium or long term legal predictability and is therefore not only problematic for the development of economic markets but also affects the social rights and stability of citizens.

- ***Entrepreneurial rights' protection on a regional level***

As mentioned previously, the legal framework and the connected concept of constitutionalization provide an idea of the way in which rights

[80] Daniel Álvarez Valenzuela and Marcela Paiva Véliz support the view that especially prior to the most recent legislative changes, the copyright system in Chile was quite one sided towards the author's protection.

[81] For instance during negotiations of a trade agreement or discussions within the international forum, see for instance explanations in chapters 3 and 4 as to the countries role in regional and international organisations

[82] "TLC y Propiedad Intelectual: Desafíos de Política Pública - en 9 países de América Latina y el Caribe", Alvaro Díaz, October 2006

and preferences are safeguarded and protected. However, the underlying principles that they ought to incorporate can be found in the embedded liberalist balance between economic and social needs. In order to examine the presence of such a balance within legislation, it is therefore important to consider why entrepreneurial rights are protected and their potential benefits, versus the essential reasons behind protecting certain types of social access and distribution.

The preambles of the EU Directives give an idea of the intentions behind the strong protective legislation, these include, for example, the thought that IP will lead to a higher number of inventions and the implementation of international obligations[83]. Therefore, a range of entrepreneurial rights are awarded and protected under community law and have to be carried through in national implementation in the member states. These are also upheld by regional and national courts. The recent legislative extensions in benefit of rights holders and interest groups within the EU once again shows that regional legislation has a difficult compromise to strike[84], between the competing interest groups involved in copyright law. Further, the importance of the creative industries for the EU economy is a significant incentive for the regional legislator to provide them with extensive protection and scope for the enforcement of their rights[85]. Although the protection of moral rights is not obligatory under TRIPS, these rights are recognised in the majority of countries on the basis of the Berne Convention[86]. The importance of moral rights as a helping provision to the economic benefits derived from creative works is essential; one could go so far as to say that they are even more important as they protect the integrity of the work and recognition of the author. In addition, their protection is

[83] This kind of logic has also been exemplified in some other regional agreements, for instance as early as 1946 in the Washington Convention.(Washington Convention on Copyright from 1946)

[84] A critical perspective on the 2011 Directive and its utility can be seen in; "Too much is never enough? The 2011 Copyright in Sound Recordings Extension Directive", Benjamin Farrand, 2012

[85] The importance of the creative industries has been explained in chapter 6

[86] The UK specifically includes the protection the authors right to be identified and the right to object to any derogation of the work (since the 2006 modification includes performers rights) in line with EU Directives and Specific reference to moral rights is made for example in 1993 Directive on harmonization of IPRs and 2001 INFOSOC Directive

generally transferred to the successors of the author when he dies, attempting to ensure that even then his interests are taken into consideration. It is therefore quite surprising that, internationally, more focus appears to be placed on the temporary economic gains, rather than on the preservation and dissemination of works[87].

There are similarities between the entrepreneurial rights protected in both the Andean Community and the EU[88]. In addition, the Andean Community has also shown to have an understanding and recognition of issues relating to copyright, which is not only evident on a purely legislative basis but also practically represented through the community courts' rulings on case law brought forth by its member states[89]. The reason for the coherence in regional legislation and case law is not only to be found in TRIPS but rather in the earlier Paris and Berne Conventions and the regional copyright treaty, whose provisions had already been accepted by the Andean member states prior to Ecuador's accession to the new WTO framework[90]. Membership of the Andean Community had a direct influence on the national legislation. The increased regional constitutionalization promoted a unified legal basis for member states to act upon, while simultaneously preparing their legal system for an increased comparability to international standards, even if a country such as Ecuador did not yet participate widely on the international stage. This illustrates that, for Ecuador, its previous membership to the Andean Community has been beneficial not only in creating a more harmonized basis for regional trade, but in addition allowing it to gradually raise its national legislative standard

[87] The conflict at the essence of a fair system has for instance been considered in: "The lawful user and a balancing of interests in European copyright law", Tatiana-Eleni Synodinou, 2010 and ""Balanced" copyright: not a magic solving word", Alan Story, 2012

[88] Founded in the provisions of several European Directives, such as Directive 2001/84/EC, Directive 2001/29/EC, Directive 2006/115/EC and Directive 2006/116/EC and also in the Andean Community Decision 351 establishing the pillars of copyright protection for the member states

[89] Based on the Andean Community Decision 351

[90] An interesting perspective on the international thresholds of copyright protection can be seen in; " Threshold requirements for copyright protection under the international conventions", Sam Ricketson, 2009

with the support of the supranational laws and guidelines[91]. This also highlights the importance of regional laws and institutions in shaping and guiding the understanding of member states towards copyright protection, while also ensuring that the legal developments can be combined with the members' preferences and social needs.

The situation of Chile can once again be contrasted against the unified and guided approach taken by regional organizations in relation to balancing the different rights and interests of copyright protection and enforcement through legislative norms and regional institutionalization. In the Agreement between Chile and the USA, provisions were included for the national treatment of trade partners' rights holders, which specifically was interpreted as meaning that they ought not to be treated less favourably than national rights holders. What can be seen from the focus of this agreement is the wish to maximise copyright protection way beyond the minimum requirements established in TRIPS. While this in itself might not seem detrimental, we must remember that the aim should be to create a balanced system, both nationally and internationally, therefore, the issue lies in providing extensive entrepreneurial rights' protection without allowing for exceptions and limitations that ensure equilibrium of rights. One might argue that Chilean rights holders have access to the US market under the same obligations, but the proportions of benefit are clearly heavily weighted towards US industry interests. Many of the other bilateral agreements include provisions for intellectual property protection which at least appear to be more guided towards promoting benefits for both trade partners.

The above section illustrates that the protection of entrepreneurial and economic rights is spread globally, not only on the basis of international legislation such as TRIPS, but it has evolved in a more detailed and high impact form through regional and bilateral agreements[92].

[91] It should be noted that for instance in "Intellectual Property Rights in the Global Economy", Keith E. Maskus, 2000, it has been argued that since the underlying purpose of regional trade areas is to provide discriminatory and preferential treatment in benefit of the creation and diversion of IPRs, this might be counterproductive to the global harmonization aimed at trough TRIPS. However, what can be seen in this analysis is that in the case of the EU and Andean Community the greater regional harmonization and extension of the minimum requirements of TRIPS are a combinable effort towards greater international uniformity, transparency and predictability of intellectual property.

[92] In the past reference has even been made to a global "troika" that lobbies and pressures on a national and international level for increased legislation

Throughout the course of the history of copyright protection, entrepreneurial rights in particular have been increasingly safeguarded, not only in their scope, but also in their duration. There is an important need for compensating creators as well as promoting continued investment in culture and knowledge, therefore the protection of entrepreneurial rights and decisive authority over distribution and public display is important for national and supra-national trade. Both economists and lawyers have put forward logical arguments in support of the protection of copyright[93], yet it is clear that copyright as a property right is distinct from natural property rights and therefore requires more than a simple one-sided approach.

- ***Exceptions and limitations to balance the regional systems***

The distinction between copyright as a form of property right and the traditional rights of owning natural forms of property is that intellectual property is, for example, non-rivalrous, therefore its use by one person does not stop someone else from also using it [94]. This is an essential contrast to other forms of private property which generally means that its use by one person inhibits someone else from using it simultaneously. Clearly this characteristic benefits the additional social aim and need which are linked to economic security and are at the heart of copyright protection[95]. Therefore, it becomes even more apparent that the international and regional legislation for copyright protection can not only set out to restrict access and use of intellectual property, knowledge and culture products, but also has to promote a social balance and development.

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in their benefit "Copyrighting Culture - The Political Economy of Intellectual Property" Ronald v Bettig, 1997, page 196

[93] See for example; "Intellectual Property Rights in the Global Economy", Keith E. Maskus, 2000 - "Copyrighting Culture - The Political Economy of Intellectual Property" Ronald V. Bettig, 1997 - " Intellectual Property Law ", L. Bentley and B. Shermann, 2008

[94] As explained in "Intellectual Property Rights in the Global Economy", Keith E. Maskus, 2000, page 28

[95] Keith E. Maskus contrasts the static and dynamic efficiencies of IP protection, page 29-33

It is important to remember that the legislative and institutional copyright protection framework is based on competing preferences and needs. The recognition of a fundamental connection between trade and social aspects[96] within cross-border markets is at the centre of understanding the need for a copyright system to balance economic growth aspirations with social development needs because states as well as regional and international institutions have to step in in order to diminish the potentially negative effects that international trade markets can have on the individual[97].

Regional organizations play an especially important role in securing the preservation of and respect for knowledge and culture, through the recognition of moral rights as well as exceptions and limitations across nations. The importance for performers and participants in the creation of works to be compensated for their work and effort is understandable and its protection is not only awarded under national but also regional legislation. Therefore, the benefits of constitutionalization, institutionalization, embedded liberalism and rights balancing are able to be distributed across member states in order to reflect their interests and preferences. The more detailed cross-border provisions for the protection of a work's integrity are elementary to the preservation and dissemination of creative works on a regional level.

The step by step development of regional and international recognition of exceptions and national tensions relating to them are to some extent visible in the EU but can also be seen more extensively in the Andean regional organization as well as in the international framework[98]. While the protection of entrepreneurial and moral rights is highly

[96] Please see previous explanations in Chapter 2 and articles such as Taking Embedded Liberalism Global: The Corporate Connection", John Gerard Ruggie, 2008 and "Reconstructing Embedded Liberalism: John Gerard Ruggie And Constructivist Approaches To The Study Of The International Trade Regime" Andrew T. F. Lang, Oxford University Press 2006

[97] For instance see "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi E. Abdelal and John G. Ruggie, New Perspectives on Regulation, page 151–162. Cambridge, 2009 and "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", James Caporaso and Sidney Tarrow, November, 2007

[98] "Implementing an international instrument for interpreting copyright limitations and exceptions", Christophe Geiger, 2009

harmonized within the EU, this does not extend to provisions of exceptions and limitations. While there are several exceptions which can be implemented by member states[99], there are no obligatory provisions to that effect which need to be implemented by members[100].

A distinction can be seen in the Andean Community's establishment of minimum exceptions, which are recognised by each of the member states[101]. It is essential and, at the same time often problematic, for a supra-national legal system to be established which provides for sufficient flexibilities, checks and balances for states to operate in the benefit of their own economic and social preferences, while simultaneously keeping limiting protectionist measures to a minimum. The Andean Community's understanding of a regional system did not only focus on the economic gains that can be achieved through intellectual creations but rather also had in mind enabling its population to have ways of legitimately accessing copyright protected works, so as to promote individuals of all economic backgrounds to increase their knowledge.

At this point we should however consider that the average income in the EU is much higher than that of the Andean Community and the benefits of a social system are not to be ignored either. Maybe the royalties and payments obtained in the high income countries and from average income individuals could be used to subsidise access to knowledge for those who could otherwise not afford it? After all, we ought to be a global community that cares about our neighbours instead of abusing their weakness for monetary gain. Centuries of nations and international companies exploiting natural resources in low income countries and then leaving them to deal with the detrimental consequences is clearly as despicable as creating knowledge only beneficial to those who have the disposable income to pay for it.[102]

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[99] See for instance Copyright Directive 2001/29/EC, Article 5

[100] For example the 2006 Directive requires member states to make provisions for accidental inclusion,

[101] Decision 351 of the Andean Community

[102] "La Remuneracion por Copia Privada ", Carlos A. Fernández Ballesteros, 2010

Chapter Conclusions

As can be seen from the examples of Ecuador and the UK, participation within a regional organization influences the impact of international legislation on these countries, while Chile is subject to particular concerns in relation to its bilateral treaty obligations when considering how to best give effect to international law. Since the implementation of international legislation cannot be generalized when it is considered in relation to national implementation and enforcement, it is unsurprising that the economic and social preferences which are expressed in such legislation also vary, accordingly so does the institutional approach towards the balancing of such rights. Therefore, the next part of this comparative analysis takes a closer look at the influence that regional organizations have upon these aspects of combining international harmonization of laws with national legal needs and preferences.

In relation to the formation of a regional organization in general, two additional underlying concepts of open regionalism could be observed. The Andean Community, as well as the European Union, strives for regional integration that focuses on a close link between the member states. Open regionalism also aims for collaboration with other countries and economies through a variety of different measures such as multilateralism and bilateral treaties; again this approach is fundamental to EU workings and increasingly important to the Andean Community[103]. Once again, the concepts of constitutionalization, embedded liberalism and proportionality were used to highlight the aspects of copyright balance within the regional legal frameworks. The importance that is placed on one preference or another in relation to copyright protection is different in the Andean Community and the EU. While in the first there is much focus on the accessibility and exchange of culture and knowledge, the EU strongly supports the creative industries. The emphasis on regional copyright balance can therefore be employed differently dependent on the needs and preferences of the member states and in turn these regional laws play an

[103] See in relation to the Andean Community: "The Andean Community: Finding Her Feet Within Changing and challenging multidimensional conditions", Mauricio Baquero-Herrera, 2004, page 29

important role in the way in which they are implemented and interpreted in the national context.

The specific link that Regional Organizations provide in order to bridge the gap between the two distinct interest groups of copyright protection, namely the rights holders and the users, is the key to understanding the modern day workings of copyright laws and the role of the EU and the Andean Community in terms of aiding the establishment of a balanced system. We exist in an ever more globalized world and the need for international standards and legislation is increasingly important to guide the operation of global markets, but a harmonized system cannot be sustainable and supported with disregard towards local, regional and individual needs[104]. Regional collaboration can take these issues into account, while also being beneficial to the market and trade liberalization between countries, therefore playing an essential role in relation to increased constitutionalization, embedded liberalism and the balancing of rights[105]. The potential that regional organizations have in harmonizing and standardising minimum protections as well as minimum exceptions available across borders to all people makes the situation not only more secure and predictable for the creation of new works, but also ensures similarly detailed rights available to users.

[104] Legitimization of laws has been explained previously in chapter 2 in the context of rights balancing and proportionality, with particular reference to "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism", Rawi E. Abdelal and John G. Ruggie, New Perspectives on Regulation, page 151–162. Cambridge, 2009

[105] These concepts have been explained extensively in the theoretical framework in chapter 2

Chapter 9

Conclusions

By examining the hypothesis that regional organizations, through their more specific harmonization of copyrights are more able to provide a balanced legal framework for their member states (by taking into account their particular needs and preferences), this research helps to provide an increased understanding of international, regional and national copyright frameworks and highlights the role that regional organizations play in achieving a balance within these. Through this analysis, valuable insight is gained as to the benefits, detriments and preferences that are at play when international copyright standards are implemented within a regional and national context, particularly in relation to developing countries. This focus on the implications of international copyright provisions and the role that regional organizations can play in their implementation is of considerable value to the understanding of the potential legal, social and economic gains that can be derived from an appropriately/correctly designed legal framework. This chapter will take a closer look at the conclusions that can be derived from this research and analysis, while some suggestions will be made towards future understanding and development of a balanced system. The implications of this study can be transferred to different regional organizations around the world, as it considered both countries such as the UK and the EU member states, which have a long copyright history and a developed economic basis, as well as Ecuador and the Andean Community members for which formal copyright protection is more recent and who still find themselves on the path of development.

The first part of this research, chapters one and two, introduced the existing literature and theoretical framework applicable to this thesis. The concepts of institutionalization, embedded liberalism and rights balancing have been identified as the relevant core principles for this analysis. This first section also illustrated the countries on which the comparative analysis is based. The purpose of selecting Ecuador, the UK and Chile is connected

to their respective membership of the Andean Community and the EU, whereas Chile is included as a more independent comparative. The choice of regional organizations and member states which have different backgrounds and concerns in relation to the growth of the supra-national and internal copyright framework, as well as the contrasting consideration of a country that is currently not a member of a regional organization, was essential to ensure that generalization and bias was kept to a minimum.

The second chapter summarized and explained the utility of choosing the concepts of constitutionalization, embedded liberalism and proportionality as analytical and illustrative frameworks for the investigation of copyright balance. Constitutionalization has been identified as a decisive concept for the understanding of the ability of international and regional legislation to influence and enforce common legal provisions across member states. In relation to this, the sub-concept of institutionalization is relevant as it highlights the function that international and regional institutions have in guiding, implementing and enforcing the common framework. The central understanding of embedded liberalism, that social considerations ought to be embedded into economic markets, has been a core consideration. The embedded liberalist compromise is particularly closely connected to copyright and its competing interests of creators and users. The practical application of legislative provisions is closely connected to the understanding of rights balancing by the courts in the application of proportionality.

The second section of this research started with a look at the TRIPS provisions as establishing an international minimum standard of copyright protection binding on all WTO member states. One important point that should be carried forward from this chapter is that countries cannot be generalized just because they participate in the WTO and TRIPS. All three countries have demonstrated a distinct historic background of international participation and with that, their interpretation and application of general binding agreements is shaped differently. Particular consideration was once again placed on the legal provisions for the protection of the creator's interests on the one side and those that balance these rights for the benefit of the public and social needs on the other. Further, chapter three also found that there can be great distinctions made between developing

countries' approaches and preferences international collaboration, particularly in relation to the WTO framework and TRIPS.

After this analysis, the study comes to the opinion that TRIPS is incapable of ensuring an even distribution of the benefits of copyright and the mitigation of negative impacts on the other hand. The utility of copyright protection cannot only be based on economic and trade concerns, but instead also needs to ensure that the creation of knowledge and culture is supported and protected. The international copyright framework therefore ought to establish and promote these balancing considerations and understanding among all member countries. The interconnection of constitutionalization of legal provisions that reflect the embedded liberalist compromise between economic and social concerns, which influences the interpretation of courts and institutions in terms of the balancing of rights in a proportional manner, becomes apparent here. The establishment of a common and harmonized supranational framework is beneficial for the flow of trade and interchange in goods; however, it is essential that not only room is given to the individual needs and concerns in the form of formalities, but rather that a balanced system is actively promoted through the establishment of guiding and restricting provisions, in the form of exceptions and limitations of the legal rights established.

This research was also prompted by the specific consideration that, if the international framework itself has problems establishing and ensuring a balanced legal structure, then what is the role of regional organizations in counter-acting or re-enforcing this negative tendency? The understanding that the TRIPS framework does not exist nor operate in isolation is central to understanding the interconnected and interdependent nature of international copyright protection, since it guards against mere generalization and a narrow focus on TRIPS as the only or main culprit of this narrative. While international legislation could do more to promote and establish a unified and equally balanced system, the actual implementation and enforcement of international legal norms is paramount to the impact it has on actual people and nations. The question of whether regional organisations can help to form and enforce a system which is more apt to provide a balance between the two competing interests of copyright was hence the driving force behind this study.

Therefore, chapter four summarized the legal and institutional framework of the EU and the Andean Community in order to take a more detailed analytical look at the specific implementation and enforcement of some member countries of both international and regional organizations as a mode of understanding the actual implications. The selection of regional organizations and member states which have different backgrounds and concerns in relation to the growth of the supra-national and internal copyright framework, as well as the contrasting consideration of a country that is currently not a member of a regional organization, was essential to ensure that generalization and bias was kept to a minimum.

Chapters five and six took a detailed look at the national provisions of Ecuador and the UK. This was done in order to ascertain whether and how international standards are found at a national level and to illustrate the effect that regionally harmonized provisions have upon these national legal frameworks. What is evident from chapter five, the case study of Ecuador, is that the regional legal framework provoked changes to the national legislation already prior to Ecuador's accession to the international standards of TRIPS. Therefore allowing the standard of protection of Ecuador as a developing country to be raised to an internationally accepted level, while also ensuring that national concerns and preferences were addressed in the implementation process. The examination of the UK's position, in chapter six, highlighted the distinct situation of a country that already has a long legal history of copyright protection and this is illustrative of a country and its regional participation which is based on the economic value that is derived through the protection of copyright by the creative industries. This, in turn, emphasised the fact that different regional organisations are providing and applying harmonised copyright standards with different focus points, depending on the preferences and interests that are relevant to their member states.

The analysis of Chile's provisions in chapter seven clearly illustrated the situation of a country which is a party to bilateral treaties rather than regional legislation and therefore provides an important point of contrast for the comparative analysis and the understanding of the effect of regional vs bilateral treaties upon national copyright frameworks. The major point that came out of the Chilean case study is that bilateral treaty obligations can

have a very different nature to internal needs, so that the most recent copyright reform had to simultaneously implement increased protections and penalties for some aspects of copyright, while also including more exceptions and limitations. This indicates the potential danger of operating independently in treaty negotiations as a developing country and shows that one country can have a very different approach to the next, although being rather close in geographic and economic terms.

The comparative analysis, contained in chapter eight and the final section of this research, identified and explained the importance of legal harmonization and increased institutionalization, not only at an international, but even more so at a regional level. This increased stability and predictability is not only beneficial to the people living in these regions, but also promotes increased regional and international trade relationships. These relationships are based on the common legal principles and understandings within the legislation, but also the application and enforcement by the regional and international courts as well as institutions. One of these common principles is, for example, the awareness of the value of recognizing and recompensing creator's works and investments. The value that is attached through the creation of copyright protected works in the form of knowledge and culture is not only protected through the award of entrepreneurial rights, but also moral rights. The need for a harmonisation of these rights on a regional and international level is equally as important as the sufficient provision of remedies and enforcement actions in order to stimulate the creation of works and the distribution of culture across borders. The stability and predictability that a common framework of protection grants for the benefit of creators and investors is also reflected in the growth of economic gains from the creative industries.

In addition, the continued importance of not only implementing unified provisions in terms of deriving economic benefits from copyright, but also supporting social considerations such as the distribution of knowledge and culture, is evident from this chapter. The principle contained in embedded liberalism as to the compromise between the different social and economic needs and interests has been utilized repeatedly to highlight this consideration. Further, the role that courts play in balancing the competing rights against each another, when interpreting and applying the legislative

framework in practice, has been employed to reflect the linkage between copyright balance and the concept of proportionality.

To establish unity between different countries in relation to the limitations and exceptions that they confer and on how to interpret regional legislation in this context is complicated. Different countries have distinct preferences and needs, both economically and socially, therefore negotiations on the extent and nature of exceptions on an international level are problematic. Member states of regional organizations, however, often have the benefit of sharing essentially similar backgrounds and future goals, while also having sometimes comparable trade and social considerations[1], therefore, it is more probable to reach a consensus within this smaller supra-national forum.

The next sections of this chapter will summarize and evaluate the research findings and conclusions in terms of the balancing of copyright and the influence of regional organizations. It will identify the implications which this research has for international concepts of copyright laws and implementation as well as the future research that would be beneficial after this research.

i. Evidence of balance within the different legal copyright systems

An appreciation of the difficult situation under international copyright law makes it even more essential to examine the actual implementation and effect within regional organizations and individual member states. The particular needs and priorities that are often not taken into account internationally find more support and understanding within regional collaboration as legislation is shaped by similar attitudes and enforcement as well as the fact that guidance on legal issues is more readily available. This can be seen particularly in relation to Ecuador and its participation within the Andean Community, while it simultaneously repeatedly expressed concerns in relation to its international participation as it felt that

[1] "Economic Analysis of Prescriptive Jurisdiction and Choice of Law", J.P. Trachtman also see "Trade Globalization, Economic Performance and Social Protection: Ninteenth-Century British Laissez-Faire and Post-World War II U.S. – Embedded Liberalism", Salvatore Pitruzzello, International Organizations , 2004 – reprinted in "Embedding Global Markets – An Enduring Challange", J.G. Ruggie, 2008

there was little consideration for its social priorities and concerns. Yet, there is also an increased legitimacy awarded to decisions which take into account social as well as economic considerations and are based on multilateral or regional negotiations which go beyond the legitimacy seen in unilateral decisions[2], as the first have a more profound interest in taking account not only of short term impacts but also long term effects, while simultaneously safeguarding nations from being coerced into an agreement or decision which they might not be able to support.

The more detailed regional constitutionalization is beneficial for a balanced copyright system since exceptions and limitations can be harmonized across borders, therefore providing an even and stable environment for the shared market as well as supporting social concerns and developments on a supra-national level. This essential link between trade and non-trade aspects of regional and international trade, as seen in the concept of embedded liberalism, cannot be maintained and enforced without a sufficiently firm institutional framework. Therefore, it is important that the regional legislators and courts place an emphasis on the different rights and interests when balancing them against one another in the application of proportionality in their interpretations. This sort of legislative and institutional support for copyright balance and the social considerations, provided through concepts such as embedded liberalism, is more evident within the Andean Community than the European Union, due its harmonization of explicit obligations for the provisions of exceptions and limitations as well as the consideration of the Andean Court of Justice towards the availability and application of them.

ii. The role of regional organizations in copyright balancing

As has been highlighted throughout this research, regional organizations play a particular role within the complex legal framework for copyright protection and balance. The comparatively smaller forum of regional harmonization and enforcement, rather than international, leads to an environment in which legislation can be more detailed and specific in

[2] See for instance explainations provided by J.G. Ruggie in “The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism” and also consider “Deliberative Democratic Theory”, Simon Chambers (both referenced before)

accordance with the particular regional perspectives and needs. This can be seen in the explicitly strong focus of the European Union on the protection of the creator's rights and the creative industries in contrast to the Andean Community which not only harmonized the legal framework for the protection of rights, but also for the core exceptions and limitations that member states had to incorporate into their national legislation, and through it, supporting the embedded liberalist compromise between trade and non-trade concerns.

The principle of regional legislation's supremacy over member state legislation is an important aspect when considering the increased constitutionalization of these legal frameworks, since it results in member states having extensive obligations which, to some extent, might restrict their independence, but on the other side provide a unified and therefore predictable and stable legal framework for cross-regional collaboration. When reviewing the role that regional organizations play in providing a balanced copyright system, it is essential to also consider the nature of legal pluralism, which is present both internally and externally, since all concepts of constitutionalization, embedded liberalism and proportionality are interconnected in their application to regional copyright protection.

Internal pluralism is illustrated by the different forms of member states' implementation and application of regional laws, but they are able to be reviewed and revised in light of regional legislation and in circumstances where such plurality has caused negative impacts on the relationship between members or citizens, accordingly harmonizing regional laws can be enacted. This process of constant legal evolution and supplementary constitutionalization is vital and evident in both the EU and the Andean Community system, through additional legislative directives and regulations as well as regional case law decisions. This approach towards internal pluralism provides the regional legal framework with a necessary flexibility which is more responsive and faster than changes at an international level, in order to embed social preferences within economic developments.

External pluralism is evident in the way in which regional organizations are part of an internationally over-arching legal structure in which they also have to operate and balance different obligations and interests with each other, therefore giving them the potential to act as

mediators between the international and national sphere of copyright protection and balance. Regional organizations are then not only able to influence the implementation and understanding of their member states of a balance between the competing rights and interests in copyright protection, but can also utilize their voice and expertise within the international forum to raise awareness and influence legislative negotiations. This is exemplified well in the active participation and recognition of the EU and its member countries in international discussions and developments.

The increased institutional structure which is in place to develop, support and enforce the member states' obligations is an essential attribute of regional organizations, as they provide member states with increased accessibility to the legislative system through participation and negotiations as well as increasing the possibility of access to regional tribunals to private actors, therefore, diminishing the risk of abuses of power and legal bias. These are functions and attributes with which an internationally centralized system struggles, while it simultaneously also has a decreased possibility of taking into account the different and specific considerations and preferences of every international member state. This highlights the fact that regional organizations are able to provide legal predictability and stability as well as guidance to a level which can hardly be expected from the international legal framework. It also follows that the benefit of regional organizations and institutions is an increased awareness and establishment of legislative provisions that are seen as beneficial for the particular regional market and in support of social development goals. Therefore, regional courts can use their interpretation of proportionality to balance the rights in a manner which is beneficial to the regional preferences of economic and social concerns, represented in embedded liberalism and legal texts. The illustration of the Andean Community's approach towards exceptions and limitations shows that, if regional organizations and their member countries have a particular concern for social development, then the copyright system can be awarded with balancing provisions on a supra-national level, which supports the growth of inter-member state trade as well as providing a unified basis for private actors to operate within.

The core principle shared between the EU and the Andean Community is the aim to establish a system that goes beyond the mere facilitation of trade and markets, towards a collaboration that also revolves

around progress towards shared social objectives and principles. This is representative of the essential link between trade and social considerations within the concept of embedded liberalism and exemplifies the recognition of the inter-connected nature of these two objectives. Trade liberalization between member states that is based on a harmonized regional framework, provides economic benefits to the public and private actors, but it can also cause detriments to one or several of the member states if left without the necessary counter-balancing provisions that safeguard and protect essential social rights and principles. One means which is employed by the EU to protect its member states from some of the external detriments of global trade are, for example, import restrictions and regulations, while also allowing regional and national support towards production and creativity, both in relation to products and culture. The Andean Community also represents the declared and explicit interest of its member states to further inter-regional collaboration, cultural exchange and support of social developments. In order to achieve this, it also supports preferential trade conditions among member states, shared initiatives for exchange and knowledge transfer as well as providing legislative provisions and interpretations which reflect the common concerns. It is through this increased potential of regional organizations to reflect, incorporate and safeguard the member states' economic as well as social principles and operation, that makes them better placed to find a positive resolution of the compromise inherent in both embedded liberalism and copyright protection.

The comparative analysis with Chile provided an example of the contrasting situation where there is a lack of supra-regional guidance and support for a national copyright legislation to operate within. While Chile appears independent in so far as it does not have to incorporate or respond to a regional legal framework or its institutions, it cannot be considered as having complete independence in decision making in relation to national copyright law. Its extensive and far reaching web of bilateral treaties place a multitude of obligations on its copyright frameworks, which it has to implement in terms of both legislation and enforcement. The implementation of a harmonized regional legal structure has been beneficial to Ecuador, particularly when it acceded to the WTO and was able to demonstrate its accordance of national laws with international standards, due to the previous implementation and application of regional

laws. Much more recently, Chile had to reform its entire copyright legislation in order to implement the extensive TRIPS+ provisions it had entered into. This struggle to incorporate an ample variety of treaties and regulations is a clear contrast to the structured implementation of regional law, in which member states can count on the support and guidance of the regional legislator and courts.

Further, the regional system provides both stability and flexibility, in the sense that changes are possible but cannot be made without thorough evaluation and assessment. Chile is free to potentially enter into a further bilateral treaty which might provoke other essential changes to its law within a short period of time, therefore having a more limited predictability in its legislative provision. This sense of stability and predictability is not only essential for the promotion of trade and investment, but also for the existence of a balance within the copyright system. The newly implemented list of exceptions and limitations in the national legislation could potentially be edited or reassessed at any point in time, therefore not allowing its full exploitation and utilization by those it ought to benefit. On the other hand, if exceptions and limitations are set out in supra-regional legislation and are linked to an obligation of the member states to implement and enforce those, more stability and ability is given to courts and actors to rely upon them, hence promoting a long term understanding and protection of a balanced copyright system among member states and their citizens.

Other countries around the world could replicate this collaboration in their own regional environment, but in order to remain strong internally and externally, the legislation has to remain flexible to change with the progress of time, technology and society. From my point of view, the answer to copyright piracy in the EU is not the endless strengthening of protection and legal remedies, but rather an education of the public on why these rights are important to be respected. Yet this outreach project could only ever be successful when the people feel that they are not just being abused for the money making of large industries, but instead have the security that there is adequate protection of legitimate users' interests. After all, the unequalled success of the European Union is not only down to economic collaboration, but to the extensive social and political cooperation that is at its core and which is supported through a harmonized legal framework.

In cases of dispute or possible non-compliance of national implementation, reassurance can be found in the fact that international and regional laws take precedence over domestic law and, while enforcement at an international level is rather complicated and slow, the regional organization can take more immediate steps. This aspect of institutionalization (and with it constitutionalization) is an important one, since it supports the harmonized implementation and enforcement of supra-national legislation and ensures that member states have remedies in situations where they feel their rights have been violated by another. In addition, regional courts have the ability to examine not only the legal problems, but also to gain an insight into the issues faced by the member states and if necessary, based on such experience, supplementary legislation might be enacted in order to fill gaps or provide additional guidance for members when needed. Therefore, the more detailed established regional constitutionalization provides an important service to member states in more than one aspect. Therefore, once again, an essential link between constitutionalization and embedded liberalism, through the establishment of provision that favours trade as well as non-trade aspects is evident and regional courts have the ability to proportionally balance rights in the context of the regional preferences.

The economic and trade benefits that are linked to the creation and protection of works is however only one side of the coin. The need for a supra-national copyright system to be of a balanced nature is derived from the need to access the created knowledge and culture by the wider society. What good can be found in works that are not utilized to their full potential, either as the basis for the spread of knowledge or as a foundation for new creations? The non-rivalry of copyright protected works is a key argument in favour of leaving sufficient room for their use by different actors, since the use by one does not inhibit the use by another. The concept of embedded liberalism has been utilised throughout the comparative analysis to highlight the complexity and potential benefit derived from such international and regional collaboration, when not only the economic and trade aspects are taken into account, but more focus is shifted towards the social needs that have to be supported and developed within international, regional and national copyright frameworks. TRIPS is only the first step. Its provisions are at many points too limited and vague and require more

detailed and adapted legislation in order to apply and work in practice. Regional organisations have the unique ability to set out such detailed regulations, which take into account the specific needs of their member states, while also promoting harmonization and stability among them and in trade relationships with outside nations[3]. Regional organizations also employ some measures of protection from excessive outside influences on the common market, through soft forms of protectionism which are aimed at decreasing the negative impact of international trade on the member states and therefore supporting the ability of these to promote social development among their citizens[4].

The example of Chile has shown throughout a lack of consistency and predictability in its national framework; this might provide it with increased flexibility in the short term but could be detrimental in the long run, not only to the users of the creative works, but also to its trade relationships and commercial stability. It is important to recognise that the provisions made for exceptions and limitations within a copyright framework are the core measure to ensure the validation of social needs within copyright law; therefore, the increased awareness and harmonization of this aspect of copyright law is essential for the development of a trade system which provides the essential rights and benefits to creators as well as accessibility to users.

iii. Steps forward: Central involvement of regional organizations in establishing balance

Throughout this research, words such as ‘harmonization’ and ‘a balanced system’ have been frequently mentioned, yet I have highlighted the lack of harmonization and the imbalance of the international framework. This prompts the reflection: Can there even be something like a 'balanced system' in today’s globalized market? When considering the importance of

[3] “Trade Globalization, Economic Performance, and Social Protection: Nineteenth-Century British Laissez-Faire and Post-World War II U.S. – Embedded Liberalism”, Salvatore Pitruzzello, International Organization, 2004 – reprinted in “Embedding Global Markets – An Enduring Challenge” edited by John G. Ruggie, 2008

[4] This emphasises once more the interconnected quality of trade and social considerations, see for instance, “Polanyi in Brussels: European Institutions and the Embedding of Markets in Society”, James Caporaso and Sidney Tarrow, November, 2007

balance, it is important to recall that a legal system is legitimized by the presence of a balance between the competing rights, needs and interests at stake. This legitimization through balancing provisions is increasingly important as the global creative industry and copyright markets become increasingly interlinked and inter-dependant. The development and growth of harmonized legal rules which not only support economic aspects of international copyright trade, but also govern the operation of actors to ensure that negative detriments are able to be counteracted, is essential. Currently, the international legal framework places no explicit and binding obligations onto the member states to incorporate and implement at least some of the most vital exceptions and limitations into their legislation, while the creator's and connected rights are based firmly in a harmonized structure which every member country has to accede to as part of the WTO. While I do not disagree with a limited term of monopoly-like use of copyrighted materials, I consider the trend towards ever increasing the term of protection awarded as dangerous, as this means that the access to ideas is restricted for such a long period of time that when they finally become available as open access materials, they are hardly relevant anymore[5].

It remains to be seen whether the current efforts of some member states and WIPO might push things into a more balanced direction, especially in regards to exceptions for the visually impaired. This cannot be considered to be sufficient for the global legislation to be balanced. The fact that there is also very little focus among the international community on if and how balancing provisions are incorporated into national legislation, as can be seen from the absence of international interest in this issue when Ecuador acceded to the WTO and TRIPS, suggests a lack of awareness as to the importance of such a balance.

Increased international legislation is needed, which focuses more on the balance of copyright and is aware of the competing interests that lie at its centre as well as the tension that can arise out of them. The increased constitutionalization of international trade law has the central benefit of providing a more stable and predictable field for nations, firms and citizens

[5] "Las Importaciones Paralelas y el Agotamiento del Derecho de Distribución en Materia de Derecho de Autor", Pablo Webrait, 2010, (Propiedad Intelectual Tomo 3)

to operate in. The notion of only taking into account certain interest groups and needs during the continued development and evolution of this international framework cannot be supported on the basis that the resulting effects from the implementation and application of such laws are felt on a much wider basis. International, regional and national courts alike have the function and need to balance the legal rights awarded to different actors against one another and they are therefore an essential instrument of enforcement and application of supra-national legislation.

However, if the harmonization and focus on balanced provision are lacking in the primary and guiding legal texts, then courts cannot create a balanced system or interpretation for lack of it. The essential link and compromise of embedded liberalism has to be reinforced and supported in legislative, institutional and implementation levels in order for its benefits to be distributed and stabilized within the international community. Based on my analysis, there is the potential for balance within the international copyright framework when making adjustments to the provisions and then employing them justly, when and how required. When one argues that there is a justification for the protection of copyright in the first place and then also considers that everyone has essential rights to not only access knowledge but also expressions of culture, there comes a point where one has to aim for some balance. A system which creates a knowledge monopoly cannot be justly supported when taking into consideration that we all ought to have the essential means to better ourselves and our positions in life.

Exemptions for access to knowledge need to be widened to include all tiers of society, without discrimination based on origin or financial means. New technologies, such as the internet, have made it easier than ever before to have knowledge at your fingertips, but it can only be used legally and rightfully by a minority of the world's population. Even when low income individuals have free access to the technology, many licensing and copyright restrictions mean that they would still need to spend large amounts of money to access information that is relevant to everyone. Instead of demonising technology and trying to protect copyright against it, why do we not seek to embrace it? Yes, there are projects out there which attempt to increase accessibility, such as Wikipedia, and an increasing number of books can now be purchased and read online, but the average

income for many people on this earth is about 1US$ per day, so the purchase of a digital book for 2-3US$ is not attainable. Therefore, the use of these new systems is, again, only focused on the consumer markets where money can be spent relatively easily, therefore widening the knowledge gap and creating a position of power over those who do not have the economic means to access knowledge through this system. There are plenty of other ways to make money in a digitalised environment other than through direct sales of copies. Advertising and voluntary (paid) subscriptions are two possibilities.

Access to culture, rather than just to knowledge, is also of considerable importance. There are millions of immigrants all over the world who have left their home language and culture behind. How can we justify blocking their access to their roots based on territorial copyright restrictions? Again, technology is here to help, not to destroy, access to music, books and movies. This should be truly global. This is not as utopian an idea as it might seem. Technology is miles ahead of the law and the law could promote its use rather than restrict it. There are better ways to compensate creators and owners which do not involve the limited dissemination of works to one specific territory or another. In the end, the purpose of these works is to be seen/heard/read by as many people as possible; opening them up to a global audience is completely in line with this purpose. Sources of income could be derived by monthly subscriptions to a sort of international resource site which is accessible from all over the world and which also has material from all over the world included within it. Additional money could be made from advertising and sponsorships of works. These are some starting points of ideas which could be developed further in the future. The important point is that we do not stagnate nor retreat into a protective mode which inhibits rather than expands laws which ought to develop over time and in accordance with the necessity of the people they are here to serve.

Globally, an increase in regional organizations could be beneficial for international equality and negotiations, further expanding the importance of international constitutionalization and institutionalization and its vital connection to the principles embodied in embedded liberalism. The importance of awarding member states with an equal voice during

negotiations as well as having firm mechanisms for dispute resolution between them is beneficial to the preferences and concerns incorporated and protected by international legislation. For example, when an agreement is previously found within a region and then joint submissions are made to international organizations, the time and uncertainty of the negotiation process would surely be decreased significantly, therefore indicating an important benefit of regional organizations and collaboration within the international system. On the other hand, regional organizations also help to ensure that their member states comply with international legislation, by not only creating a common legal framework but also by having regional enforcement agencies and courts which are vital to safeguard a just and reliable implementation of laws[6]. This is true not only for the protection of copyright, but for the protection of private and public laws in general.

Based on the research and the comparative analysis, it is evident that regional organizations are able to be more responsive to the particular needs and challenges of their member states, due to the fact that there is a common background and similar development goals than in the broader international context. The additional fact that consensus and implementation needs to be achieved in a smaller number of nations also contributes to the effectiveness of both legislation and institutions at a regional level. The aspect of a more wide reaching and developed constitutionalization as well as institutionalization of regional organizations is an important factor which enhances the harmonization, stability and enforcement of supra-national copyright law within regional organizations. This is evident in both the EU and the Andean Community, since the regional legislators and courts are actively involved in the establishment and application of communal law, which is binding upon member states. The role of regional institutions in supporting and protecting this common legislative framework is vital, since provisions which do not result in implementation and application amount to mere words. The importance of a harmonized and stable legislative basis is not only evident in relation to the benefits derived from it for trade, but also in terms of knowledge, cultural and technological exchange, since if actors are more reassured of their rights, they have an increasing willingness to collaborate and share with

[6] In addition there are economic considerations for (and some against) regional unification of laws. See for example: "The Economics of Uniform Laws and Uniform Lawmaking", John Linarelli, 2003

each other. While, therefore, the harmonized protection of creators' rights also has beneficial knock-on effects in terms of some social aspects, legislative provisions which establish a reliable balance of the system are essential in order for long term developments and aims not to be threatened.

The essential compromise and connection between economic/trade related rights and social protection, as explained through embedded liberalism, can be supported better in applicable regional frameworks, since regional legal harmonization allows for flexibilities to take into account the shared aims, needs and preferences of the member states. The fact that these two regional organizations are formed by nations with different backgrounds and preferences is reflected within the regional copyright legislation. The EU has an enhanced supportive and protective attitude towards creators and the creative industries, while the Andean Community has pursued the establishment of a system which also takes into account the needs of the users. While none of these two systems is at the level of providing an ideal balance between the distinct rights and interests that are at the heart of copyright, they provide clear advantages in comparison to the non-regional strategy currently employed by Chile. The fact that harmonized laws and regulations govern over a region that is inter-connected through trade and social objectives provides predictability and increased opportunities for development to the actors and citizens involved in it.

The need for further balancing provisions to be established and enforced in all countries that have been considered during this research is evident. However, such progress is more attainable, sustainable and beneficial when done on a regional level rather than only internationally or nationally. The essential recommendations that can be drawn from this research and analysis is that, parallel to increasing the emphasis and efforts of creating a more balanced international copyright framework, through the establishment of key exceptions and limitations that every member country has to implement into national legislation, regional collaboration, constitutionalization and institutionalization should be pursued and supported. The need for increased balance within the copyright framework is best served when general social concerns are

supported, while flexibilities are provided for increased balance when appropriate to the national situation. This would involve a reconsideration of exactly how extensive creators' rights should and have to be, as their limitation in some circumstances is necessary in order to achieve increased accessibility and development towards knowledge and culture. In turn, the consideration of rights balancing by the courts remains an essential feature of the balanced application and enforcement of copyright and therefore a stronger emphasis on achieving this balance by courts is highly desirable.

iv. Further areas of academic research

Future research should be conducted on the situation of the least developed countries and the issue of implementing a copyright system which protects knowledge and culture which previously was shared and available freely, in order to understand the cultural impact of legal changes. While the current research has made an important step towards highlighting and re-enforcing the necessity of balanced copyright protection and has shown that the generalization of the impact and influences that TRIPS has on WTO members is only a limited part of the story, there are different legislative, institutional and motivational factors which impact the copyright framework of nations. It has particularly illustrated the increasingly important role and potential that regional organizations have in supporting and guiding the implementation and application of international copyright legislation, for the benefit of their member states. The requirement to not only take a general look at legislation and implementation in categories such as developed or developing countries, but instead focus on the particular differences and similarities that arise out of more specific comparisons is essential. The more analysis is based on broad comparisons without detailed considerations, the more errors are possible in the application of derived theories, since the particular situations and needs are the ones that have a much more direct and magnified impact.

Another potential area of research could be based on the understanding that an estimated 90% of contracts weaken copyright limitations and exceptions; therefore the establishment of new legal

principles might not bear as much fruit as thought[7]. Thus, it would be necessary to conduct further research into the connection between terms of contract and copyright legislation in different countries, in order to assess what would be the potential impact of these practices and what implications need to be derived for future regulations and considerations in order to potentially safeguard not only certain rights as inalienable, but also some exceptions or limitations.

A further point that arises out of this analysis is the need for an increased awareness of the close connection that exists between law, economics and social developments. An increasingly inter-subjective study of the questions relating to cross-national legal frameworks becomes necessary in order to better examine these links and interdependencies. Only if a more thorough understanding can be reached through the analysis of the same issues from different perspectives can adequate resolutions be developed, which would not just benefit one particular area while disregarding the knock on effects it has on others. The need for academics to collaborate in this kind of research with each other and the international community holds great potential to increase the practical use that can be derived from the analysis, comparative study and proposed solutions. What good is academia if it has no practical value in relation to provoking thought and resolution of the issues it highlights and examines? The ivory tower of legal academia needs to be placed in the globally interconnected forest of trade and social needs, if it does not want to collapse into uselessness.

[7] As explained in the UK Government Response to European Commission's Green Paper - Copyright in the Knowledge Economy, December 2008

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